Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1999

DONALD RAY BUCHANAN,
Petitioner,

v.

THE STATE OF WASHINGTON
Respondent.

Petition for a Writ of Certiorari to the Washington Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Washington Supreme Court's restrictive interpretation of Indian hunting rights under the Stevens Treaties ignores the plain language of those Treaties and conflicts with settled principles of treaty construction in the federal courts?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

DONALD RAY BUCHANAN, *Petitioner,*

v.

THE STATE OF WASHINGTON, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT

Donald Ray Buchanan respectfully petitions for a writ of certiorari to review the judgment of the Washington Supreme Court in this case.

OPINIONS BELOW

The Washington Supreme Court's opinion is reported at 138 Wn.2d 186, 978 P.2d 1070 and reprinted in the appendix hereto ("App.") at A1-28. That opinion reversed the decision of the Court of Appeals, Div. III, reported at 87 Wn. App. 189, 941 P.2d 683 and reprinted at App. B1-8. The Court of Appeals affirmed the dismissal of charges against petitioner by the Superior Court of Yakima County. The Findings of Fact and Conclusions of Law supporting the Order of Dismissal are reprinted at App. C1-7.

JURISDICTION

The Washington Supreme Court filed its judgment on June 17, 1999. App. A1. Petitioner's timely motion for reconsideration was denied on August 3, 1999. App. D1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

TREATIES INVOLVED

Article V of the Treaty of Point Elliott, January 22, 1855, 12 Stat. 927 (App. E1-7), provides:

> The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands; *provided, however*, that they shall not take shell fish from any beds stated or cultivated by citizens.

The Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132; Treaty of Point No Point, January 26, 1855, 12 Stat. 933; Treaty with the Makah, January 31, 1855, 12 Stat. 939; Treaty of Olympia, July 1, 1855, 12 Stat. 971; and Treaty with the Yakamas, June 9, 1855, 12 Stat. 951, are involved in this case.

STATEMENT OF THE CASE

The Point Elliott Treaty of 1855, by its express terms, secures and limits tribal hunting within "open and unclaimed lands." The terms of the Treaty do not restrict hunting to ceded lands.[1] Whereas the tribal right to fish is restricted and reserved in the Treaty to "usual and accustomed grounds and stations," there are no such geographic limitations on hunting. App. E1-7.

On January 6, 1995, petitioner Donald Buchanan, an enrolled member of the Nooksack Indian Tribe, his brother, and uncle were stopped by Washington Department of Fish and Wildlife ("DFW") officers with two recently killed elk in their possession in the Oak Creek Wildlife Area, on land owned by the Washington Department of Natural Resources, east of the summit of the Cascade Mountains.[2] Buchanan explained to the officers that he was hunting for subsistence purposes pursuant to the Point Elliott Treaty. App. C2.

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[1] In previous treaties including the Potowatomi Treaty 1826 (Art. 7), Miami Treaty 1826 (Art. 8), Chippewa Treaty 1829 (Art. VII), Pawnee Treaty 1833 (Art. II), and Ottawa Treaty 1836 (Art. Thirteenth), the right of hunting had been restricted to lands ceded by the Indians to the United States. App. C3-4, E1-2.

[2] The lands ceded to the United States by the tribal parties to the Point Elliott Treaty are bordered on the east by the summit of the Cascade Range.

The Nooksack Indian Tribe, a party to the Point Elliott Treaty, regulates hunting by its members through its Hunting Regulations and Hunting Code. At the time of this incident, Buchanan possessed valid tribal tags to hunt elk for subsistence purposes in the area in question. Buchanan had not violated any tribal regulations. App. C2-3.

Buchanan was charged with two felony counts of violating RCW 77.16.020(1)(E), which prohibits possessing big game during the closed season, and one misdemeanor count of violating RCW 77.21.60(2), for hunting while his Washington hunting license was revoked. App. C2.

Buchanan moved to dismiss the charges before trial on the ground that he was lawfully exercising his subsistence hunting rights under the Point Elliott Treaty. The superior court judge dismissed the charges after a hearing on the motion, rejecting the State's arguments that the treaty hunting right was limited to ceded lands and traditional hunting grounds. App. C1-7.

The Court of Appeals unanimously affirmed, stating:

> [T]he Point Elliott treaty, by its express terms, does not limit hunting rights to the ceded lands or to traditional hunting grounds. Although fishing is reserved only on usual and accustomed grounds and stations, hunting rights extend anywhere in the territory that is open and unclaimed.

App. B4.

The Washington Supreme Court granted the State's petition for review on April 1, 1998. DFW and the Modern Firearm Hunters of Washington filed amicus briefs supporting the State's position. The late Professor Ralph W. Johnson of the University of Washington Law School filed an amicus brief supporting affirmance. Seventeen tribes of Washington State filed a joint brief supporting affirmance and providing an overview of tribal management and cooperation regarding off-reservation hunting. App. A5-6.

The Washington Supreme Court reversed, adopting the State's argument that "the hunting right reserved by the treaty was limited to the right previously exercised—that is to the ceded lands or to lands upon which the Nooksack Tribe traditionally hunted." App. A17. The decision states:

> The geographic scope of the hunting right cannot be resolved from the language of the treaty alone. We hold that application of the reservation of rights doctrine is the more legally sound approach to interpreting the hunting rights provision of the Treaty of Point Elliott. Under such an analysis, open and unclaimed lands within the aboriginal hunting grounds of the Nooksack Tribe are reserved under the treaty for hunting by tribal members, so long as the lands remain open and unclaimed. The geographic area available for hunting would certainly include the territory ceded to the United States and described in article I of the Treaty of

> Point Elliott, and may include other areas if those areas are proven to have been actually used for hunting and occupied by the Nooksack Tribe over an extended period of time. Because the trial court did not so limit the geographic scope of the Nooksack's treaty, we reverse the dismissal of the charges against defendant Buchanan.

App. A21. The court held that "on remand, the defendant should have the opportunity to prove that the Nooksack Tribe's aboriginal hunting grounds include the land within the Oak Creek Wildlife Area." App. A21.

The Washington Supreme Court's determination of the geographic scope of Indian hunting rights under the Stevens Treaties was a final decision that "will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975); *see Brady v. Maryland*, 373 U.S. 83, 85 n.1 (1963); *Radio Station WOW v. Johnson*, 326 U.S. 120, 124-27 (1945).

The State has agreed to stay any further proceedings on remand pending resolution of the treaty issue in this Court.

REASONS FOR GRANTING THE WRIT

The Washington Supreme Court overstepped its authority by adding geographic restrictions to the Stevens

Treaties incompatible with their plain language and contrary to settled principles of treaty construction.

The Washington Supreme Court's decision turned on its invocation of the so-called "reservation of rights doctrine," which (in that court's idiosyncratic interpretation) restricts treaty rights to mid-19th century tribal practices. This unprecedented use of the "reserved rights" doctrine, which limits treaty hunting rights to areas of historic use and occupancy, conflicts with the Eighth Circuit's decision in *Mille Lacs Band v. Minnesota*, 124 F.3d 904, 933 (8th Cir. 1997), *aff'd* 526 U.S. 172 (1999).

The Ninth Circuit has rejected similar attempts by Washington State to apply this "doctrine" to restrict tribal rights under the Stevens Treaties regarding anadromous fish, *United States v. Washington*, 384 F.Supp. 312, 362, 401-02 (W.D. Wash. 1974)(Boldt, J.), *aff'd*, 520 F.2d 676, 691-92 (9th Cir. 1975) *cert. denied*, 423 U.S. 1086 (1976), and shellfish. *United States v. Washington*, 873 F.Supp. 1422, 1431 (W.D. Wash. 1994)(Rafeedie, J.), *aff'd in relevant part*, 135 F.3d 618, 630-31 (9th Cir. 1998), *cert. denied* ___ U.S. ___, 119 S. Ct. 1377 (1999).

The decision in this case, which affects the hunting rights of every treaty tribe in Washington,[3] has set back efforts between the tribes and the State to coordinate game management, and has created confusion and uncertainty for courts, prosecutors, enforcement officers, tribes and tribal hunters. Establishing the geographic boundaries of the ceded lands and aboriginal hunting grounds will require extensive litigation in trial courts which must now try to reconcile inconsistent federal and state standards for determining traditional use.

I. THE STATE COURT'S DISREGARD FOR THE PLAIN LANGUAGE OF THE STEVENS TREATIES CONFLICTS WITH SETTLED PRINCIPLES OF TREATY CONSTRUCTION

Interpretation of Indian treaty language is subject both to general rules applicable to statutes, contracts and treaties and

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[3] Every treaty in Washington State, including the Point Elliott Treaty, was negotiated by Isaac Stevens, first Governor and first Superintendent of Indian Affairs for Washington Territory, over a short period of time with common councils *in pari materia*, and contains substantially the same proviso regarding hunting. *See* Treaty of Medicine Creek (Art. IV); Treaty of Point No Point (Art. IV); Treaty with the Makah (Art. IV); Treaty of Olympia (Art. III); and Treaty with the Yakamas (Art. III); *State v. Miller*, 102 Wn.2d 678, 681, 689 P.2d 81 (1984); *see generally Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 661-69 (1979)(hereinafter "*Fishing Vessel*"). All of the treaty tribes in Washington State are therefore affected by the ruling of the Washington Supreme Court.

to special canons applicable only to such treaties. *See Sutherland on Statutory Construction*, § 64.03 at 269 (5th ed. 1992); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942).

A. Plain Language

The Stevens Treaties are unambiguous regarding the geographic scope of the hunting right. As opposed to the fishing right, which is confined to "usual and accustomed grounds and stations," the hunting right[4] is restricted only to "open and unclaimed lands."

In *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989), this Court cautioned:

> [W]here the text is clear, as it is here, we have no power to insert an amendment. As Justice Story wrote for the Court more than a century and a half ago:
>
> > "[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of

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[4] The Washington Supreme Court has interpreted the words "privilege" and "right," as used in the Stevens Treaties, to be synonymous. App. A16; *State v. Miller, supra*, 102 Wn.2d at 683-84.

> interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops -- whatever may be the imperfections or difficulties which it leaves behind." *The Amiable Isabella,* 6 Wheat. 1, 71 (1821).

490 U.S. at 134-5 (footnote omitted).

Even if evidence existed that the United States had intended to restrict the hunting right in the Stevens Treaties to ceded lands and aboriginal hunting grounds, this Court has stated more than once:

> [T]reaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.

Choctaw Nation v. United States, 318 U.S. 423, 432 (1943); *accord*, *United States v. Choctaw and Chickasaw Nation*, 179 U.S. 494, 531-533 (1900).

In *Maximov v. United States*, 373 U.S. 49 (1963), this Court noted:

> [I]t is particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty between this Nation and a foreign sovereign, when, as here, there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.

373 U.S. at 54. Without any support from the language of the Stevens Treaties or the treaty negotiations, the Washington Supreme Court reached a result that conflicts with the obvious meaning of the treaties and virtually every canon of Indian treaty interpretation.

B. *Expressio Unius Est Exclusio Alterius*

Numerous treaties, in contrast to the Stevens Treaties, specifically limit hunting and fishing to ceded lands.[5] Moreover, while the Stevens Treaties limit fishing to "usual and accustomed grounds" they do not similarly limit hunting.

If the United States had intended to restrict hunting to ceded lands or traditional hunting areas, as the drafter of the treaties it was obligated to include these restrictions in the treaty language. Under the rule of contract and statutory interpretation, *expressio unius est exclusio alterius* (specific inclusions exclude implication), the restriction to "open and unclaimed" land is exclusive. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793 n.9 (1995); *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163, 168 (1993); *TVA v. Hill*, 437 U.S. 153, 188 (1978).

This rule is not a legal technicality, it is a matter of common sense:

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[5] *See e.g.* the treaties listed in note 1, *supra*, and excerpted in App. F1-2.

> Although the expressio unius maxim has had widespread legal application, there is nothing peculiarly legal about it. it is a product of 'logic and common sense'. . . . It expresses the learning of common experience that when people say one thing they do not mean something else.

Sutherland on Statutory Construction, § 47.24 at 228 (5th ed. 1992).

Where the United States can accomplish an objective by clear and direct words, and where it has chosen to do so in similar or closely related circumstances in the past, this Court has found the absence of those clear and direct words to suggest a lack of intent to accomplish the same purpose. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *Williams v. Florida*, 399 U.S. 78, 97 (1970); *Crawford Fitting Company v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987).

The *expressio unius* rule is related to the axiom of contract law that a contract should be construed against its drafter. 2E Farnsworth, *Farnsworth on Contracts* § 7.11, pp. 265-68 (1990). This axiom is particularly important in construing Indian treaties.

C. Treaties are Broadly Interpreted in Favor of Indians

In *Antoine v. Washington*, 420 U.S. 194 (1975), an Indian hunting rights case, this Court declared:

> The canon of construction applied over a century and a half by this court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice. . . In *Choate v. Trapp*, *supra*, also a case involving a ratifying statute, the court stated: "The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith."

420 U.S. at 199-200.

This Court has held the United States to a higher standard of good faith -- "a responsibility to avoid taking advantage of the other side" -- because of its "presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded," *Fishing Vessel*, *supra*, 443 U.S. at 675-6. In its decision below, the Washington Supreme Court acknowledged the rule that the language of a treaty should not be construed to the prejudice of the Indians, App. A15, *citing Minnesota v. Mille Lacs Band of Chippewa Indians*, ____ U.S. ____, 119 S. Ct. 1187 (1999), and *Antoine*, *supra*, 420 U.S. at 199, but the court undercut the basis for this rule.

> The stereotype of Indian leaders at treaty talks as being passive and overmatched intellectually is wrong.

> The negotiators for the Nez Perce, and for other tribes as well, had a complete understanding of the situation. . . .
>
> The calculus was about power, and the tribes could make the calculations as well as the white people. The tribal negotiators were sophisticated and they used every technique and device available to them. . . .They made their arguments precisely and ably.

App. A14.

In reaching its decision, the State Supreme Court did not construe the language of the Treaty to the benefit of the Indians. The court ignored the language of the Treaty, ignored settled principles of Indian treaty construction, and adopted an argument that has been rejected by both the Eighth Circuit and the Ninth Circuit -- the so-called "reservation of rights doctrine."

II. THE WASHINGTON SUPREME COURT'S ERRONEOUS APPLICATION OF THE "RESERVED RIGHTS" DOCTRINE CONFLICTS WITH DECISIONS OF THE EIGHTH CIRCUIT AND THE NINTH CIRCUIT

The Washington Supreme Court based its decision on the State's argument that the treaties only reserved the mid-19th century rights that Indians had actually exercised, so a treaty hunting right is geographically limited to traditional hunting areas. This so-called "reservation of rights" argument was rejected by the Eighth Circuit in *Mille Lacs*

Band v. Minnesota, *supra*, 124 F.3d 904, 933 (8th Cir. 1997), *aff'd* 526 U.S. 172 (1999).

The argument is flawed in two respects. First, it misconstrues the "reserved rights" language in *Fishing Vessel* and its predecessor, *United States v. Winans*, 198 U.S. 371, 380 (1905). Second, it attempts to define the reserved rights too narrowly.

A. The "Reserved Rights" Doctrine Is A Liberal Rule Of Treaty Interpretation

One of the basic canons of Indian treaty construction, first stated in the case of *United States v. Winans*, *supra*, is that in order to "give effect to the treaty," certain rights inuring to the benefit of the Indians, though not stated in the language of the treaty, may be inferred. *Id.* at 381. Because a treaty involves a grant to the United States from the "larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment," rights which were not explicitly granted to the United States in the terms of the Treaty were reserved to the Indians. *Id.*

The *Winans* Court found that, in order to give effect to the purposes of the Treaty, the "right of taking fish," limited to "usual and accustomed grounds and stations," included the unwritten but "reserved" right to cross private lands to the fishing grounds along the Columbia river. *Id.*

In *Winters v. United States*, 207 U.S. 564 (1908), this Court applied the *Winans* "reserved right" doctrine in finding that the right to use the waters of the Milk River for irrigation was impliedly reserved in the agreement establishing the Fort Belknap Reservation. There was no evidence that the Indians had ever used the river for irrigation before the agreement, but the use of the waters was found to be a "reserved right," necessary to give effect to the agreement. 207 U.S. at 576; Felix S. Cohen, *Handbook of Federal Indian Law*, at 578-81 (1982).

Neither *Winans*, *Winters*, nor *Fishing Vessel* held or even suggested that an Indian treaty can only secure previously-exercised rights. The "reserved rights" doctrine is a liberal rule of Indian treaty, statute, and contract interpretation, not a means for the United States to escape its sworn obligations. This language should not be misconstrued to suggest that Treaties do not also contain grants of rights from the United States to the Indians. Indeed, the *Winans* Court itself recognized that:

> Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations . . . or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.

198 U.S. at 383-84.

As a second example, in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), this Court found that by setting aside "the body of lands known as Annette Islands" as a reservation for the Metlakahtla Indians, who had recently emigrated from British Columbia, Congress had intended to secure the use of the adjacent fishing grounds for the foreign-born Indians.

> That Congress had power to make the reservation inclusive of the adjacent waters and submerged land as well as the upland needs little more than statement. All were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority. . . The reservation was not in the nature of a private grant, but simply a setting apart, "until otherwise provided by law," of designated public property for a recognized public purpose -- that of safe-guarding and advancing a dependent Indian people dwelling within the United States.

248 U.S. at 87-88 (citations omitted).

More recently, in *Mille Lacs Band v. Minnesota*, No. 3-94-1226 (D. Minn. Mar. 29, 1996)("*Mille Lacs III*"),[6] *aff'd*, 124 F.3d 904 (8th Cir. 1997), *aff'd* 119 S. Ct. 1187 (1999),

Federal District Judge Michael J. Davis rejected the same "reserved rights" argument that the Washington Supreme Court adopted. His reasoning is persuasive:

> The Landowners and the Counties argue that the Wisconsin Bands do not hold usufructuary rights in the Minnesota portion of the 1837 ceded territory because none of the Wisconsin Bands used and occupied the area at treaty times. The Wisconsin Bands contend that the treaty expressly guarantees all the signatory bands the privilege of hunting, fishing and gathering throughout the ceded territory and that nothing in the treaty suggests that a particular band must prove its historical use of a particular portion of the ceded territory before exercising its rights there.
>
> The Landowners and Counties do not and cannot, point to any language in the 1837 Treaty that limits the usufructuary rights granted to certain areas within the ceded territory. Nor does the case law support the argument.
>
> The power of Congress to establish or recognize rights or reservations for Indian tribes does not derive from the Indians' aboriginal title to lands, it derives from the Constitution. . .The Counties' reliance on *Winans, supra, Seufert Bros. Co. v. United States. . .and United States ex rel Charlie v. McGowan*. . . is misplaced as those cases involved treaties that granted rights for the taking of fish "at all the usual and accustomed grounds and stations." As this language suggests, the rights granted under

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[6] The unreported Memorandum Opinion and Order is excerpted and attached as App. G1-4.

> [that clause of] these treaties was limited to those areas historically used by the Indians.
>
> In this case, the 1837 treaty only limited the exercise of usufructuary rights to areas within the ceded territories. The treaty does not contain any language restricting the right to hunt, fish or gather within certain areas within the ceded territory.
>
> . . . . Absent clear language limiting the Chippewa to exercise their usufructuary rights only in the areas they occupied, this motion must be denied.

App. G2-3.

The Eighth Circuit Court of Appeals affirmed this decision, stating:

> All of the cases cited by the Counties in support of its argument include treaty language which supports a limitation on the scope of the right. The 1837 Treaty does not tie usufructuary rights to historic use or occupancy, and thus the Counties' urgings defy the plain language of the Treaty.

124 F.3d at 933.

As recognized in *Winans* and subsequent cases of this Court, the United States had complete authority to reserve Tribal hunting on "open and unclaimed lands" throughout the Territory of Washington, whether or not the Tribes had traditionally hunted in these areas, in order to "perform [its] obligation" to protect the Tribes' subsistence -- a "public

purpose appropriate to the objects for which the United States h[e]ld the Territory." 198 U.S. at 383-84. The plain language of the Treaties does exactly that.

B. The Stevens Treaties Reserved Part Of The Tribes' Subsistence Right To Hunt

The Ninth Circuit has rejected similar attempts by Washington State to apply its "doctrine" to restrict tribal rights under the Stevens Treaties regarding anadromous fish and shellfish.

Almost 25 years ago, in *United States v. Washington*, *supra*, 384 F.Supp. 312 (W.D. Wash. 1974), Judge Boldt rejected the State's "reservation of rights" argument that the Stevens Treaties restricted tribal fishing only to traditional methods and species. 384 F.Supp. at 401-02. He also rejected the argument that reef net fishermen, who had traditionally fished close to shore, had not reserved the right to fish in deeper waters. *Id.* at 362. Judge Boldt's reasoning applies directly to tribal hunting:

> In aboriginal times, Indian fishermen, like all fishermen, shifted to those locales that seemed most productive at any given time. . .

384 F.Supp. at 362; *accord,* 520 F.2d at 691-92.

Twenty-five years later, in the shellfish litigation, Washington argued once again that the "reserved rights"

language from *Winans* and *Fishing Vessel* could be used to restrict tribal rights that had not been "exercised." The District Court disagreed.

> Defendant and the intervenors have argued that the "right of taking fish" must be limited to those species of fish the Tribes actually took prior to the signing of the Stevens Treaties. At that time, however, the Tribes had the absolute right to harvest any species they desired, consistent with their aboriginal title. *See Lac Court Oreilles Band, Etc. v. Voigt,* 700 F.2d at 352. The fact that some species were not taken before treaty time--either because they were inaccessible or the Indians chose not to take them--does not mean that their right to take such fish was limited. Because the "right of taking fish" must be read as a reservation of the Indians' pre-existing rights, and because the right to take any species, without limit, pre-existed the Stevens Treaties, the Court must read the "right of taking fish" without any species limitation.
>
> The effort by the defendants to read a species limitation into the "right of taking fish" must fail in light of the canons of construction favoring Indians. Defendant and the intervenors ask the Court to impose a limit on the "right of taking fish" without pointing to any treaty language in support of that interpretation. This is impermissible under *Winters* and *Choctaw Nation*.

United States v. Washington, supra, 873 F.Supp. at 1431 (Rafeedie, J.).

On appeal, the Ninth Circuit Court of Appeals affirmed this reasoning.

> With all deference to the State, there is no language in the Treaties to support its position: the Treaties make no mention of any species-specific or technology-based restrictions on the Tribes' rights.

United States v. Washington, *supra*, 135 F.3d 618, 630-31(footnotes omitted).[7] The Washington Supreme Court's conclusion in this case is also unsupported by the language of the Treaties -- there is no reference to geographic limitations on the Tribes' right to hunt.

Prior to signing the Stevens Treaties, Indians could fish or hunt wherever and whenever they needed to, subject only to tribal custom. The right to fish had not been limited to the tribes' "usual and accustomed grounds and stations," and the right to hunt had not been limited to "open and unclaimed lands."

> The right to resort to the fishing places in controversy was a part of *larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment*, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed.

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[7] *See also Yakama Indian Nation v. Flores*, 955 F.Supp. 1229, 1246 (E.D. Wash. 1997)(rejecting Washington State's claim that the treaty-reserved right to travel "does not extend to [Yakama] logging trucks, because logging is a modern 'Euroamerican' enterprise").

Winans, *supra*, 198 U.S. at 381 (emphasis added).

Neither in *Fishing Vessel* nor *Winans* did this Court use specific geographic terms to describe "rights previously exercised." In *Fishing Vessel* this Court said that "the Indians had always exercised *the right to meet their subsistence and commercial needs* by taking fish from treaty area waters. . ." 443 U.S. at 678-79 (emphasis added). The rights this Court spoke of were the right of subsistence and the right to earn a livelihood—two of the "larger rights possessed by the Indians." *Winans*, *supra*, 198 U.S. at 381.

The Stevens Treaties limited fishing geographically to customary areas. The Treaties limited hunting to unsettled "open and unclaimed" areas. The right to meet subsistence and commercial needs had been "exercised" by taking fish. *Fishing Vessel*, *supra*, 443 U.S. at 678-79. The right to meet subsistence needs had also been exercised by taking game.

But whether or where the "the privilege of hunting" had previously been exercised has no significance with regard to the understanding of the parties to the Treaty--even if the Treaty were analyzed without regard to the understanding of the Indians, but rather according to the understanding of nineteenth century American lawyers. *See generally*, Lund, *Early American Wildlife Law*, 51 N.Y.U. L. Rev. 703, 712-

714 (1976). The privilege of hunting was not an interest to or in land, and, like the privilege associated with a modern fishing or hunting license, did not depend on the exercise of that privilege. *See Mille Lac Band of Chippewa Indians v. Minnesota,* 861 F.Supp. 784, 833-34 (D. Minn. 1994)(*"Mille Lac II"*).[8]

III. IMPORTANCE

Subsistence hunting has become increasingly important in light of diminishing salmon returns and the listing of the threatened Puget Sound Chinook under the Endangered Species Act, 16 U.S.C. §1531, et seq. *See* 64 Fed Reg. 14308, 14319 (March 24, 1999). For hunters from a number of tribes, including petitioner's Nooksack Tribe, conservation closures of traditional herds require that they travel outside ceded lands in order to harvest game from healthy herds.[9]

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[8] Land and water rights depend on use and possession. *Georgia v. South Carolina*, 497 U.S. 376, 393 (1990); *Arizona v. California*, 460 U.S. 605, 620 (1983); Ballantine, *Title by Adverse Possession*, 32 Harv. L. Rev. 135 (1918). On the other hand, at the time of the Treaties, American law followed a policy of "free taking," recognizing everyone's right to take game. Lund, *supra* at 705-06, 712.

[9] The Nooksack elk herd (Game Management Unit 418) and the Skokomish herd (Unit 636) are subject to Conservation Closures. WAC 232-28-242. DFW Regional Wildlife Biologist Roger McKeel testified that "[t]he [Nooksack] herd at one time numbered in the thousands and approximately a thousand animals in the early 70s. It's presently, from what I read in our reports, about 300 animals." RP 32.

Following the Court of Appeals' decision, the Washington DFW and a number of Washington tribes jointly initiated efforts to coordinate hunting regulations, exchange information,[10] and negotiate a comprehensive cooperative management agreement. *See* App. H1-2, I1-2. The need to resolve cultural differences and establish protocols for game management has become critical in light of diminishing game populations and the loss of habitat. App. I4, 7, 12.

This case has generated extensive television, radio and newspaper coverage, with front-page articles and editorials in almost every major newspaper in Washington State. *See, e.g.* App. I1-12. Tribal leaders view the State Supreme Court's decision reversing the Court of Appeals as a rewriting of sacred treaties in order to appease large numbers of non-tribal hunters. Significant damage to a delicate relationship between the tribes and the State has hampered negotiations toward cooperative game management agreements. Several tribes have now indicated their interest in pursuing an allocation of game in yet another massive federal case under the Stevens Treaties. *See* App. I12.

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[10] DFW's lack of information regarding tribal hunting was clearly illustrated during the motion hearing before the trial court when DFW Biologist McKeel was unable to produce any information regarding the number of tribal hunters in the State of Washington or elk kills by tribal hunters. App. C4.

The Washington Supreme Count's decision has created confusion and uncertainty for courts, prosecutors, enforcement officers, tribes and tribal hunters. The boundaries of the lands ceded by the Washington tribes under the Steven Treaties are vague, and at times overlapping. Several hunting cases involving disputes over these boundaries were stayed pending resolution of the case below, and may now result in conflicting decisions in neighboring jurisdictions.

Even more daunting is the challenge for trial courts and tribal hunters regarding the proof of traditional hunting areas outside the ceded lands. Establishing usual and accustomed fishing grounds and stations has necessitated years of litigation in the federal courts and enormous expenditures. *See, e.g. United States v. Washington, supra* 384 F.Supp. at 359-79; *United States v. Washington*, 459 F.Supp. 1020 (W.D. Wash. 1978); *United States v. Washington*, 626 F.Supp. 1405 (W.D. Wash. 1985). Determining traditional hunting grounds will be that much more difficult in view of the stealthy nature of the chase, and the fact that hunters followed the herds over broad and rough terrain.[11]

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[11] A fact sheet published by Washington DFW acknowledges that "[t]he process of proving such traditional use for each of Washington's 26 treaty tribes could be long and complex."

Moreover, the burden of proof created by the Washington Supreme Court conflicts with the burden for establishing traditional fishing areas in federal court, and is unrelated to the nature of hunting. In *U.S. v. Washington, supra*, Judge Boldt set out the following standard for determining traditional fishing grounds and stations:

> "Usual and accustomed," being closely synonymous words, indicate the exclusion of unfamiliar locations and those used infrequently or at long intervals and extraordinary occasions. Therefore, the court finds and holds that every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters, is a usual and accustomed ground or station. . .

384 F.Supp. at 332.

On the other hand, the Washington Supreme Court will allow a treaty hunting defense outside the ceded lands only in "those areas . . .proven to have been actually used for hunting *and occupied* by the [defendant's tribe] *over an extended period of time.*" [12] (Emphasis added.)

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[12] The Washington Supreme Court fails to indicate the genesis of this standard or any basis for confining hunting to areas that had been occupied over an extended period of time.

Reconciling these conflicting standards will be quite an arduous task, and the burden on Washington tribal hunters asserting a treaty defense in traditional hunting areas outside the ceded lands may prove insurmountable.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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STATE OF WASHINGTON, *Petitioner*

v.

DONALD RAY BUCHANAN, *Respondent.*

No. 66054-9. En Banc.

SUPREME COURT OF WASHINGTON

138 Wn.2d 186; 978 P.2d 1070

June 17, 1999, Filed

August 3, 1999, Reconsideration denied

COUNSEL: Jeffrey C. Sullivan, Prosecuting Attorney, and Kenneth L. Ramm and Lauri M. Boyd, Deputies, for petitioner.

Law Offices of David S. Vogel, by David S. Vogel, for respondent.

Kevin R. Lyon and Ronald J. Whitener on behalf of Squaxin Island Tribe; Mason D. Morissett on behalf of Tulalip Tribes; Bill Tobin on behalf of Nisqually Indian Tribe; Phillip E. Katzen and Allen H. Sanders on behalf of Sauk-Suiattle and Stillaguamish Tribes; Kathryn J. Nelson on behalf of Pt. Gamble S'Klallam, Jamestown S'Klallam, Lower Elwha S'Klallam, and Skokomish Tribes; Debra S. O'Gara on behalf of Puyallup Tribe; Harold Chesnin on behalf of Upper Skagit Tribe; Daniel A. Raas on behalf of Lummi Tribe; Alix Foster and Allan E. Olson on behalf of Swinomish Indian Tribal Community; John C. Sledd on behalf of Suquamish Indian Tribe; Elizabeth F.M. Nason on behalf of Bands of Yakama Indian Nation; Jeffrey J. Bode on behalf of Nooksack Tribe; and Robert L. Otsea, Jr., and Alan C. Stay on behalf of Muckleshoot Indian Tribe, amici curiae.

Christine O. Gregoire, Attorney General, and Robert K. Costello, Assistant, on behalf of Department of Fish and Wildlife, amicus curiae.

Joseph L. Coniff, Jr., on behalf of Modern Firearm Hunters of Washington, amicus curiae.

Ralph W. Johnson, amicus curiae.

GUY, C.J. -- This is a criminal prosecution for illegal hunting of elk in the State-owned Oak Creek Wildlife Area. The defendant, a member of the Nooksack Indian Tribe, claims he has a treaty right to hunt elk in the Oak Creek Area, and that this right may not be restricted by state hunting regulations. The issues presented are (1) whether the geographic scope of the tribe's treaty right to hunt on open and unclaimed lands includes the Oak Creek Wildlife Area, (2) whether the Oak Creek Wildlife Area is open and unclaimed land, and (3) whether the tribe's treaty right to hunt outside the reservation was abrogated by Washington's admission to the Union "on equal footing" with the original states.

We reverse the dismissal of the criminal action and remand for trial. We hold that, on remand, the defendant may raise a treaty right to hunt as a defense to the criminal charges and may offer evidence in support of his position that the Oak Creek Wildlife Area is within the aboriginal hunting grounds of the Nooksack Tribe. We also hold that under the facts presented in this case, the Oak Creek Wildlife Area is "open and unclaimed" land within the meaning of the Nooksack's treaty. We decline, in this case, to

reconsider prior case law on whether the equal footing doctrine applies to impliedly abrogate Indian treaty rights in Washington.

FACTS

On January 6, 1995, defendant Donald Buchanan was stopped by Department of Fish and Wildlife enforcement officers while Buchanan was hunting in the Oak Creek Wildlife Area, land which is owned and managed by the State of Washington. The defendant was in possession of two recently killed five-point, branch-antlered bull elks. At the time he was stopped, the defendant's Washington state hunting license had been revoked, and the Washington elk hunting season was closed.

The Oak Creek Wildlife Area, which is near Yakima, is open to the public at specified times each year for hunting, fishing and recreational purposes. During the fall and winter of 1994-95, state regulations permitted elk hunting in the Oak Creek Wildlife Area only from November 5 through 13, 1994. The number of branch-antlered elk that could be killed also was regulated during the hunting season, and only young "spike bulls" could be killed without a special permit. The purposes of the restrictions on elk hunting in the Oak Creek Wildlife Area are to maintain and manage the existing elk population. However, there is not an immediate threat to elk, as a species, in the Oak Creek Wildlife Area.

Defendant Buchanan is a resident of Kent, Washington, and a member of the Nooksack Indian Tribe. At the time he was stopped by Wildlife enforcement officers, he possessed both a Nooksack Tribe identification card and hunting tags issued by the Tribe. The

Nooksack Tribe's reservation is located in Whatcom County, near Deming. The lands ceded to the United States by the Nooksack Tribe under the provisions of the Treaty of Point Elliott,[1] which is the treaty involved here, are bordered on the east by the summit of the Cascade range. The Oak Creek Wildlife Area is east of the territory ceded to the United States by the Nooksacks.

Defendant Buchanan was charged with two felony counts of possessing big game during a closed season, former RCW 77.16.020(1)(E), former RCW 77.21.010(1) (second or subsequent violation), and with one misdemeanor count of hunting while license is revoked. Former RCW 77.21.060(2).[2]

Defendant Buchanan moved to dismiss the charges on the ground that State hunting regulations do not apply to hunters, like Buchanan, who are members of Indian tribes that have a treaty right to hunt on open and unclaimed lands. He claims the only regulations that govern his hunting on open and unclaimed lands are those of the Nooksack Indian Tribe.

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[1] Treaty Between the United States and the Dwamish, Suquamish, and other allied and subordinate Tribes of Indians in Washington Territory, Jan. 22, 1855, 12 Stat. 927.

[2] Former RCW 77.16.020(1) provided in pertinent part: "It is unlawful to hunt, fish, possess, or control a species of game bird, game animal, or game fish during the closed season for that species." Laws of 1987, ch. 506, sec. 59. Former RCW 77.21.010(1) provided that a subsequent violation of the hunting laws must be prosecuted and punished as a Class C felony. Laws of 1988, ch. 265, sec. 3. Former RCW 77.21.060(2) provided, in pertinent part, that it was "unlawful for a person to conduct an activity requiring a wildlife license, tag, or stamp for which they have had a license forfeiture[.]" Laws of 1989, ch. 314, sec. 6. In 1998 the Legislature revised and recodified the criminal laws governing the taking of fish and wildlife. Laws of 1998, ch. 190. The prohibitions and penalties have not changed. See RCW 77.15.410 (unlawful hunting of big game); RCW 77.15.670 (unlawful hunting while hunting privileges revoked).

The trial court granted the motion to dismiss the charges, ruling: (1) the language of the Treaty of Point Elliott does not restrict hunting to open and unclaimed lands within the area ceded by the Indians to the United States, but instead gives tribal members a right to hunt anywhere in the "Territory of Washington"; (2) the term "open and unclaimed lands" includes public lands, such as the Oak Creek Wildlife Area, which are put to uses compatible with an Indian hunting privilege; and (3) although Indian hunting privileges may be limited if necessary for conservation, the State, in this case, failed to demonstrate that application of State hunting regulations to treaty tribe hunters is necessary for conservation.

On appeal, the State challenged the trial court's conclusions and, additionally, argued that the Treaty of Point Elliott was abrogated by Congress when Washington was admitted to the Union on equal footing with the original states. The Court of Appeals affirmed and declined to consider the equal footing argument, as that issue was not presented to the trial court and was not asserted to be of constitutional magnitude. *State v. Buchanan*, 87 Wn. App. 189, 196, 941 P.2d 683 (1997), *review granted*, 134 Wn.2d 1012, 958 P.2d 316 (1998). This court granted the State's petition for review.

Several treaty tribes, including the Nooksack Tribe, have filed an amicus brief providing an overview of tribal management of off-reservation hunting by tribal members, a description of cooperative agreements governing wildlife management between tribes and between various tribes and the State, and further setting

forth the tribes' position on the meaning of "open and unclaimed" lands.[3] Professor Ralph Johnson of the University of Washington School of Law has filed an amicus brief on the proper interpretation of the treaty language "open and unclaimed" lands. An amicus brief has been filed by the Department of Fish and Wildlife on the issues of the geographical scope of the treaty right involved and on the designation of the Oak Creek Wildlife Area as open and unclaimed lands during the winter months. Modern Firearm Hunters of Washington has filed an amicus brief in support of the State's equal footing argument.

Prior to oral argument in this court, the State filed a motion captioned, "Request for Judicial Notice or to Supplement the Record Under RAP 9.11." In its motion the State argues that defendant Buchanan should not be permitted to raise the defense that he has a treaty right to hunt because the Nooksack Tribe was not a signatory to the Treaty of Point Elliott. Defendant Buchanan responded to the motion and, additionally, moved for sanctions against the State, arguing the motion was frivolous and made for purposes of delay. Both motions were passed to the merits.

ISSUES

1. What is the geographic scope of the Nooksack Indian Tribe's treaty hunting right?

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[3] The tribes joining in the amicus brief are the Squaxin Island Tribe, Tulalip Tribes, Nisqually Indian Tribe, Port Gamble, Jamestown and Lower Elwha Bands of S'Klallam for the Skokomish Tribe, Puyallup Tribe, Upper Skagit Tribe, Sauk-Suiattle Tribe, Stillaguamish Tribes, Swinomish Indian Tribal Community, Suquamish Tribe, Yakama Indian Nation, Lummi Tribe, Nooksack Tribe, and Muckleshoot Indian Tribe.

2. Is the State-owned Oak Creek Wildlife Area "open and unclaimed lands" within the meaning of the Treaty of Point Elliott?

3. Were those provisions of the Treaty of Point Elliott which conflict with the State's right to regulate off-reservation hunting abrogated by Congress when Washington was admitted to the Union upon "equal footing" with the original states?

DISCUSSION

We begin by denying both the State's motion for judicial notice or to supplement the record and the defendant's motion for sanctions.

In its motion, the State first argues that this court should take judicial notice that the court lacks "subject matter jurisdiction" over defendant Buchanan's defense because the Nooksack Tribe was not a signatory to the Treaty of Point Elliott and Buchanan, therefore, has no treaty hunting rights.

The State's motion raises a new issue--that is, whether defendant Buchanan failed to prove a necessary element (the existence of a treaty) of his defense. The court generally will not consider issues which are not set forth in the petition for review, RAP 13.7(b), nor arguments raised for the first time on appeal. *See, e.g., Hansen v. Friend,* 118 Wn.2d 476, 485, 824 P.2d 483 (1992). However, this rule does not apply when the issue raised affects the right to maintain an action. *Jones v. Stebbins,* 122 Wn.2d 471, 479, 860 P.2d 1009 (1993). In this case, the State claims that defendant Buchanan does not have a right to maintain his defense and, therefore, the court should take judicial notice that it is without jurisdiction to consider it.

The issue raised by the State does not present a jurisdictional question. Jurisdiction is the power of the court to hear and determine the class of action to which a case belongs. *State v. Werner,* 129 Wn.2d 485, 493, 918 P.2d 916 (1996); *Bour v. Johnson,* 80 Wn. App. 643, 647, 910 P.2d 548 (1996). This is a criminal felony action brought by the State. The trial court had authority to determine the legal and factual issues involved. RCW 2.08.010; *Werner,* 129 Wn.2d at 493. This court has the power to determine the appeal. RCW 2.04.010.

Alternatively, the State asks to supplement the record with documents showing that the Nooksack Indian Tribe has previously taken the position that it was not a party to the treaty. This issue was resolved in 1978 in an action in which the State of Washington was a defendant, and in which the trial court ruled that the Nooksack Indian Tribe was included in the Treaty of Point Elliott. *United States v. Washington,* 459 F. Supp. 1020, 1040-41 (W.D. Wash. 1978) (posttrial substantive orders following the initial Boldt decision),[4] *aff'd,* 645 F.2d 749 (9th Cir. 1981) (the appeal does not challenge the trial court's ruling relating to the Nooksack's status as a treaty tribe).

The State argues that this court need not consider the federal court decision because it is "a lower federal court case which is

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[4] The first of the so-called "Boldt decisions" is set forth in *United States v. Washington,* 384 F. Supp. 312 (W.D. Wash. 1974). The underlying litigation and the Boldt decision orders have been the subject of numerous actions in both Washington and federal courts. *Puget Sound Gillnetters Ass'n v. Moos,* 92 Wn.2d 939, 603 P.2d 819 (1979), traces the history of the litigation through 1979.

non-binding precedent on this court." Request for Judicial Notice at 6. However, the State was a party to the federal court case and is bound by its ruling. *Puget Sound Gillnetters Ass'n v. Moos*, 92 Wn.2d 939, 953, 603 P.2d 819 (1979) (all parties, and all those who are in privity with parties, must comply with the federal court orders entered in United States v. Washington). *See also Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998) (the doctrine of collateral estoppel prevents relitigation of an issue, in state court, after the party against whom the doctrine is applied has had a full and fair opportunity to litigate his or her case in federal court). The State claims the federal trial court's decision on the issue is erroneous, but it did not appeal the trial court's findings and conclusion with respect to the Nooksack Tribe. Recourse from an erroneous federal court decision is through the federal system. *Puget Sound Gillnetters*, 92 Wn.2d at 952. Accordingly, we deny the motion to supplement.

Although we deny the State's motion, we decline to impose sanctions against it. We are satisfied that the motion was filed in good faith.

We turn now to the substantive issues in this appeal.

Defendant Buchanan's defense to the criminal charges brought against him is that he is not subject to State hunting laws because he has a treaty right to hunt on any open and unclaimed lands in "Washington Territory," and that this treaty right is superior to the right of the State to regulate hunting.

The State makes essentially three arguments. First, it argues that any treaty hunting right that exists in the Nooksack Tribe

should be interpreted to permit hunting only on open and unclaimed land within the area ceded to the United States by the tribe, or upon land which the tribe has traditionally hunted. Second, the State argues that even if the treaty affords a right to hunt outside the ceded area, the Oak Creek Wildlife Area is not "open and unclaimed" land. Finally, it urges this court to hold that no treaty right to hunt or fish in violation of State regulations survived Washington's admission to the Union on "equal footing" with the original states.

Our initial inquiry is to determine the geographic scope of the Nooksack Tribe's treaty hunting right.

In 1854 and 1855 Isaac Stevens, who was the first Governor and Superintendent of Indian Affairs for Washington Territory, negotiated several treaties between the United States and the various tribes and bands of Indians who lived in the Territory.[5] *See generally United States v. Washington,* 384 F. Supp. 312, 353-57 (W.D. Wash. 1974); *Seufert Bros. Co. v. United States,* 249 U.S. 194, 39 S. Ct. 203, 63 L. Ed. 555 (1919).

At the time the treaties were negotiated, approximately three-fourths of Western Washington's 10,000 or so inhabitants were Indians. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 664, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979) (hereafter Fishing Vessel). The natural resources

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[5] In addition to what is now Washington State, Washington Territory included parts of Idaho and Montana. *See* Charles F. Wilkinson, *Indian Tribal Rights and the National Forests: The Case of the Aboriginal Lands of the Nez Perce Tribe,* 34 Idaho L. Rev. 435, 436-37 (1998).

appeared to the parties to be inexhaustible. *Fishing Vessel,* 443 U.S. at 669.

In the treaties, the Indians relinquished their interest in most of the Territory in exchange for monetary payments. Additionally, certain relatively small parcels of land were reserved for the exclusive use of particular tribes or bands, and the Indians were afforded other guarantees, such as certain rights of fishing and hunting. *Fishing Vessel,* 443 U.S. at 662.

The Treaty of Point Elliott was made in January 1855 and ratified March 8, 1859. As noted above, the Nooksack Indian Tribe was judicially determined to be a party to the treaty in *United States v. Washington,* 459 F. Supp. 1020. The first article of the treaty includes a description of lands ceded to the United States by the Indians. The treaty provides, in article 1, that the "said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at [the inlets and bays of western Washington Territory] to the summit of the Cascade range of mountains." Treaty of Point Elliott at 927.

Article 5 of the treaty provides:

> The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.

Treaty of Point Elliott at 928.

This paragraph was substantially the same in all of the Stevens Treaties,[6] and its language has been the subject of extensive litigation in both state and federal court during much of the last century. *See, e.g., United States v. Winans,* 198 U.S. 371, 25 S. Ct. 662, 49 L. Ed. 1089 (1905); *Seufert Bros.,* 249 U.S. 194, 63 L. Ed. 555, 39 S. Ct. 203; *Tulee v. Washington,* 315 U.S. 681, 62 S. Ct. 862, 86 L. Ed. 1115 (1942); *State v. Towessnute,* 89 Wash. 478, 154 P. 805 (1916); *State v. Wallahee,* 143 Wash. 117, 255 P. 94 (1927); *State v. McCoy,* 63 Wn.2d 421, 387 P.2d 942 (1963); *State v. Chambers,* 81 Wn.2d 929, 506 P.2d 311 (1973); *State v. Petit,* 88 Wn.2d 267, 558 P.2d 796 (1977); *State v. Miller,* 102 Wn.2d 678, 689 P.2d 81 (1984); *Atwood v. Shanks,* 91 Wn. App. 404, 958 P.2d 332 (1998); *United States v. Alaska Packers' Ass'n,* 79 F. 152 (N.D. Wash. 1897); *United States v. Hicks,* 587 F. Supp. 1162

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[6] In some of the treaties the language with respect to shellfish is omitted. See, e.g., Treaty Between the United States and the Walla-Walla, Cayuses, and Umatilla Tribes and Bands of Indians in Washington and Oregon Territories, June 9, 1855, art. I, 12 Stat. 945, 946 [hereinafter Treaty Between the Walla-Wallas]; Treaty Between the United States and the Yakama Nation of Indians, June 9, 1855, art. III, para. 2, 12 Stat. 951, 953 [hereinafter Treaty Between the Yakamas]; Treaty Between the United States and the Nez Perc Indians, June 11, 1855, art. III, para. 2, 12 Stat. 957, 958 [hereinafter Treaty Between the Nez Perce]; Treaty Between the United States and the Flathead, Kootenay and Upper Pend d'Oreilles Indians, July 16, 1855, art. III, para. 2, 12 Stat. 975, 976 [hereinafter Treaty Between the Flatheads]. In some the privilege to hunt and gather roots and berries also includes the right to pasture cattle and horses on open and unclaimed land. See, e.g., Treaty Between the Walla-Wallas, 12 Stat. at 946; Treaty Between the Yakamas, 12 Stat. at 953; Treaty Between the Nez Perce, 12 Stat. at 958; Treaty Between the United States and the Qui-nai-elt and Quil-leh-ute Indians, Jan. 25, 1856, art. III, 12 Stat. 971, 972; Treaty Between the Flatheads, 12 Stat. at 976. The Treaty between the United States and the Makah Tribe also secures to the tribe the right of whaling or sealing at usual and accustomed grounds. Treaty Between the United States and the Makah Tribe of Indians, Jan. 31, 1855, art. IV, 12 Stat. 939, 940.

(W.D. Wash. 1984); *United States v. Washington,* 384 F. Supp. 312; *United States v. Washington,* 157 F.3d 630 (9th Cir. 1998); *State v. Arthur,* 74 Idaho 251, 261 P.2d 135 (1953). See also Wilkinson, supra, at 447-48; Dana Johnson, *Native American Treaty Rights to Scarce Natural Resources,* 43 U.C.L.A. L. Rev. 547, 552 (1995); Bradley I. Nye, *Where Do the Buffalo Roam? Determining the Scope of American Indian Off-Reservation Hunting Rights in the Pacific Northwest,* 67 Wash. L. Rev. 175 (1992); Laurie Reynolds, *Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption,* 62 N.C. L. Rev. 743 (1984).

These authorities and others provide a framework for judicial examination of the treaty language involved here.

Like any treaty between the United States and another sovereign nation, a treaty with Indians is the supreme law of the land and is binding on the State until Congress limits or abrogates the treaty. U.S. CONST. art. VI; *Antoine v. Washington,* 420 U.S. 194, 201, 95 S. Ct. 944, 43 L. Ed. 2d 129 (1975); *State v. McCormack,* 117 Wn.2d 141, 143, 812 P.2d 483 (1991).

A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereigns. *Fishing Vessel, 443 U.S. at 675; State v. Courville, 36 Wn. App. 615, 619, 676 P.2d 1011 (1983).* When the signatory nations are not at war and neither is the vanquished, it is reasonable to assume the parties bargained at arm's length. *Fishing Vessel, 443 U.S. 658 at 675, 61 L. Ed. 2d 823, 99 S. Ct. 3055.* In discussing the negotiations

involved in another Stevens Treaty, that with the Nez Perce, Professor Wilkinson states:

> [T]he stereotype of Indian leaders at treaty talks as being passive and overmatched intellectually is wrong.
>
> The negotiators for the Nez Perce, and for the other tribes as well, had a complete understanding of the situation. The white people wanted their land, and had the population and technology to take it. The tribes, on the other hand, had considerable leverage: in time they would lose a military campaign, but they could exact great costs in terms of human life and monetary expenditures to fight a war on the fragile, far edge of American territory.
>
> The calculus was about power, and the tribes could make the calculations as well as the white people. The tribal negotiators were sophisticated and they used every technique and device available to them. . . . They made their arguments precisely and ably.

Wilkinson, *supra*, at 438 (footnotes omitted).

The goal of treaty interpretation is the same as the goal of contract interpretation to determine the intent of the parties. *Fishing Vessel*, 443 U.S. 658 at 675, 61 L. Ed. 2d 823, 99 S. Ct. 3055; *United States v. Washington*, 157 F.3d at 642. The analysis of the parties' intention begins with the language of the treaty and the context in which the written words are used. *United States v. Washington,* 157 F.3d at 642. In interpreting a treaty between the United States and an Indian tribe, the treaty must "'be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.'" *Fishing Vessel,* 443 U.S. at 676

(quoting *Jones v. Meehan*, 175 U.S. 1, 11, 20 S. Ct. 1, 5, 44 L. Ed. 49 (1899)); *Miller*, 102 Wn.2d at 683.

Where there is ambiguity in the language of a treaty, it must not be construed to the prejudice of the Indians. *Minnesota v. Mille Lacs Band of Chippewa Indians*, ____ U.S. ____, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999); *Antoine*, 420 U.S. at 199; *Miller*, 102 Wn.2d at 683. However, courts may not ignore treaty language that, viewed in its historical context and given a fair appraisal, clearly runs counter to the tribe's claims. *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774, 105 S. Ct. 3420, 87 L. Ed. 2d 542 (1985); *Department of Ecology v. Yakima Reservation Irrigation Dist.*, 121 Wn.2d 257, 277, 850 P.2d 1306 (1993). Additionally, treaties must be construed liberally in favor of Indians. *Ecology*, 121 Wn.2d at 277; *State v. Price*, 87 Wn. App. 424, 429, 942 P.2d 377 (1997).

A key principle of treaty interpretation is known as the "reservation of rights doctrine." First announced in *United States v. Winans*, 198 U.S. 371, 49 L. Ed. 1089, 25 S. Ct. 662, a case involving interpretation of a Stevens Treaty made with the Yakama Indians,[7] the reservation of rights doctrine holds that a treaty between the federal government and an Indian tribe is not a grant of rights to the Indians but, rather, a grant from them. In other words, the Indians ceded certain rights possessed by them at the time of making the treaty but reserved whatever rights were not

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[7] In 1994, the Yakima Indian Nation adopted the spelling of Yakama. See *State v. Price*, 87 Wn. App. 424, 425 n.1, 942 P.2d 377 (1997). This spelling is used throughout this opinion when referring to the Yakama Nation, except where the spelling "Yakima" appears in the title of an article or case.

expressly granted to the *United States*. *Winans*, 198 U.S. at 381. See also *Seufert Bros*., 249 U.S. at 199; *Fishing Vessel*, 443 U.S. at 679-81; Wilkerson, supra, at 454-55.

Under the reservation of rights doctrine, tribal members have possessed certain rights, such as hunting and fishing rights, from time immemorial. A treaty between a tribe and the United States documents a grant of some rights from the tribe to the federal government. However, those rights not expressly ceded in the treaty, as well as those expressly reserved, remain with the tribe. Johnson, supra, at 553.

The reservation of rights doctrine has consistently been applied to the fishing and hunting provisions of the Stevens Treaties. *See, e.g., Fishing Vessel*, 443 U.S. at 679-81; *Seufert Bros*., 249 U.S. at 196.

The treaty language at issue here is the following:

> The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians . . . together with the privilege of hunting . . . on open and unclaimed lands.

This court has interpreted the words "privilege" and "right," as used in the treaty, to be synonymous. *Miller*, 102 Wn.2d at 683. The United States Supreme Court has interpreted the treaty language "securing" or "secured" rights to be synonymous with "reserving" rights previously exercised. *Fishing Vessel*, 443 U.S. at 678.

The State argues that the hunting right reserved by the treaty was limited to the right previously exercised that is to the ceded lands or to lands upon which the Nooksack Tribe traditionally hunted. We agree.

The scope of a tribe's off-reservation hunting rights is generally found in an Indian tribe's aboriginal use of or title to land and its reservation of the right in a treaty, or by agreement, executive order or statute. *See generally* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 441-46 (Rennard Strickland & Charles F. Wilkinson eds., 1982). Mr. Nye explains the origin of the right as follows:

> Though hunting rights can arise from various sources, most existing off-reservation hunting rights in the Pacific Northwest were reserved by tribes in treaties signed with the federal government between 1853 and 1871. Treaties were the primary means by which the federal government sought to provide for the orderly westward expansion of non-native society. In the typical treaty, the signatory Indians relinquished their rights to aboriginal lands in exchange for money and confinement to a reservation with distinct boundaries.
>
> The reservation system, in addition to minimizing confrontations between encroaching settlers and the resident Indians, was also intended to transform Indians into "a pastoral and civilized people." As a result, game populations were not one of the primary factors considered in the federal government's choice of reservation lands, and many tribes were removed to reservations located far from their traditional hunting grounds. In response to a strong desire on the part of tribes to retain access to these areas, treaties with Northwest Indians provided for . . . "the privilege of hunting . . . on open and unclaimed lands[.]" In essence, these treaty provisions preserved a portion of the aboriginal rights exercised by the signatory tribes.

Nye, *supra*, at 177-78 (footnotes omitted). *See also* Reynolds, *supra*, at 752 (because the tribes could have reserved their aboriginal hunting and fishing rights only on lands which they actually hunted and fished at the time of the treaty, the primary

inquiry must determine whether the area allegedly protected by the treaty formed part of the tribe's aboriginal territory).

> To determine the existence of original Indian title to land, and the right to hunt and fish following from that title, courts have generally required a showing of actual use and occupancy over an extended period of time. In *Mitchel v. United States* [34 U.S. (9 Pet.) 711, 9 L. Ed. 283 (1835)] the United States Supreme Court said:
>
> > Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals.
>
> In claims against the United States based upon original title, a requirement of exclusive use and occupancy has been satisfied by a showing that two or more tribes jointly or amicably hunted in the same area to the exclusion of others. . . .
>
> The existence of aboriginal hunting and fishing rights, however, does not necessarily turn upon the existence of original title to lands and is not dependent upon recognition in a treaty or act of Congress. Aboriginal rights remain in the Indians unless granted to the United States by treaty, abandoned, or extinguished by statute. When a treaty has been signed, aboriginal use may still be important to determine the extent of the rights reserved under the treaty.

COHEN, *supra*, at 442-43 (footnotes omitted).

There is no evidence in the record on appeal to support a finding that the Nooksack Tribe actually occupied or used, over an extended period of time, the Oak Creek Wildlife Area for hunting. The only area which the record shows the Tribe clearly used for

hunting lies within the lands ceded to the United States in the treaty.

Defendant Buchanan argues that the Tribe's right to hunt does not depend on proof of aboriginal title or preexisting hunting practices and grounds. Instead, he claims the hunting right is based not on aboriginal title but on the treaty. In support of this argument, Buchanan points to fishing rights cases which interpret the phrase "usual and accustomed grounds and stations." These cases, he argues demonstrate that the treaty right to hunt or fish does not depend on aboriginal title or use. Buchanan additionally argues that the treaty fishing right is a limited one that permits fishing only at the usual and accustomed places, but that the hunting right is limited only to "open and unclaimed lands."

The treaty fishing right which was reserved by the Indians in the Stevens Treaties has been interpreted to provide a broad right to treaty tribes to fish outside of their ceded lands in all usual and accustomed fishing areas, without regard to whether these areas were part of the usual habitat of the tribe and without regard to whether there had been consistent and exclusive use of the areas. *United States v. Washington*, 384 F. Supp. at 332; *Fishing Vessel*, 443 U.S. at 666. The treaty fishing right has been interpreted as insuring tribes a right to a fixed percentage of the number of harvestable fish, *United States v. Washington*, 384 F. Supp. at 343, and, further, interpreting the right as a permanent one, unless abrogated by Congress. *United States v. Washington*, 384 F. Supp. at 331-32.

In contrast, the treaty hunting right, by its terms, is of a temporary and self-limiting nature. The right was intended to diminish as lands became settled, without the need of congressional action. *See, e.g., Hicks*, 587 F. Supp. at 1165. The treaty hunting clause contained in the Stevens Treaties has not received the extent of analysis to which the fishing clause has been subjected and, although *State v. Chambers*, 81 Wn.2d 929, 506 P.2d 311, noted that the defendant, a Yakama tribal member, killed a deer on privately-owned property at least 40 miles from the nearest territory ceded to the United States by the Yakamas in their treaty, the issue now before us has not previously been squarely addressed by this court. *See also Hicks*, 587 F. Supp. at 1164.

The Supreme Courts of Idaho and Montana, interpreting Stevens Treaties, have held the treaty right is a reserved right "to hunt upon open and unclaimed land . . . at any time of the year in any of the lands ceded to the federal government though such lands are outside the boundary of their reservation." *Arthur*, 74 Idaho at 265; *see also State v. Coffee*, 97 Idaho 905, 556 P.2d 1185 (1976); *State v. Stasso*, 172 Mont. 242, 563 P.2d 562 (1977) (relying on the Idaho cases).

Mr. Nye provides the following analysis:

> Treaty clauses reserving Indian rights to hunt on "open and unclaimed lands" . . . do not expressly limit these rights to ceded lands. However, treaties were reservations of aboriginal rights, and both the signatory tribes and the federal treaty negotiators understood that rights of access would be limited to traditional hunting grounds which remained "open and unclaimed" or "unoccupied."

> . . . If the principles of treaty construction are strictly followed . . . the right should be limited to the aboriginal hunting grounds of the signatory Indians. This line of demarcation should be based not on the treaty descriptions, but on other evidence which better captures the understanding of the Indians upon entering the treaty. Any line drawn must necessarily be approximate, and the principles of treaty interpretation require that any ambiguous questions be resolved in favor of the Indians.

Nye, *supra*, at 190-91 (footnotes omitted).

The geographic scope of the hunting right cannot be resolved from the language of the treaty alone. We hold that application of the reservation of rights doctrine is the more legally sound approach to interpreting the hunting rights provision of the Treaty of Point Elliott. Under such an analysis, open and unclaimed lands within the aboriginal hunting grounds of the Nooksack Tribe are reserved under the treaty for hunting by tribal members, so long as the lands remain open and unclaimed. The geographic area available for hunting would certainly include the territory ceded to the United States and described in article I of the Treaty of Point Elliott, and may include other areas if those areas are proven to have been actually used for hunting and occupied by the Nooksack Tribe over an extended period of time. Because the trial court did not so limit the geographic scope of the Nooksack's treaty, we reverse the dismissal of the charges against defendant Buchanan. However, we hold that, on remand, the defendant should have the opportunity to prove that the Nooksack Tribe's aboriginal hunting grounds include the land within the Oak Creek Wildlife Area.

We next consider whether the Oak Creek Wildlife Area is "open and unclaimed land" under the meaning of the Treaty of Point Elliott.

Under article 5 of the treaty, the Nooksack Tribe has a right to hunt on open and unclaimed lands. The United States Supreme Court has held that the treaty right to hunt, like the treaty right to fish, may only be regulated by the state "in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." *Antoine*, 420 U.S. at 207 (citing *Puyallup Tribe v. Department of Game,* 391 U.S. 392, 398, 88 S. Ct. 1725, 20 L. Ed. 2d 689 (1968)). The "appropriate standards" requirement obligates the state to prove that its regulation is a "reasonable and necessary conservation measure, and that its application to the Indians is necessary in the interest of conservation." *Antoine,* 420 U.S at 207 (citation omitted); see also *Miller,* 102 Wn.2d at 688 n.5 ("We do not read Antoine as giving Indians the exclusive right to hunt, but rather as ensuring that their right to hunt is not impaired for purposes other than those of conservation.")

The trial court entered a finding of fact stating that the State had not produced any evidence that the treaty tribe hunters were capable of having a significant impact on the elk population in the Oak Creek area or in the State of Washington and, further, that the State had failed to sustain its burden of proving that the application of its regulations to Nooksack Indians or to Point Elliott Treaty hunters is necessary for conservation. The State did not assign error to this finding and, therefore, it is a verity on appeal. *State v.*

Smith, 130 Wn.2d 215, 223, 922 P.2d 811 (1996); *State v. Echeverria,* 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). The question of whether the State's regulations, which closed the hunting season, restricted the taking of antlered elk and established a winter feeding station, are necessary conservation measures is not properly before the court.

We limit our inquiry to whether the Oak Creek Wildlife Area is open and unclaimed land within the meaning of the Treaty of Point Elliott.

This court has previously interpreted the meaning of "open and unclaimed lands" as that term is used in Stevens Treaties in two decisions. Under both decisions, publicly-owned lands are considered "open and unclaimed." In *Miller,* 102 Wn.2d at 680 n.2, the court held that national forest land is "open and unclaimed" land within the meaning of the treaty. In *Chambers*, 81 Wn.2d at 936, this court approved a jury instruction defining "open and unclaimed lands" as "lands which are not in private ownership." These decisions are consistent with those of other jurisdictions interpreting Stevens Treaties. *See Stasso,* 172 Mont. at 248 (national forest service lands that have not been patented to a private person are open and unclaimed lands within the meaning of a Stevens Treaty); *Arthur*, 74 Idaho at 261 (the term "open and unclaimed" land as used in a Stevens Treaty was intended to include and embrace such lands as were not settled and occupied by the whites under possessory rights or patent or otherwise appropriated to private ownership and may include national forest reserve lands); *Coffee,* 97 Idaho 905, 556 P.2d 1185 (privately-

owned land is not open and unclaimed within the meaning of a Stevens Treaty); *Confederated Tribes of Umatilla Indian Reservation v. Maison,* 262 F. Supp. 871 (D. Ore. 1966) (national forests lands considered open and unclaimed under the terms of a Stevens Treaty), *aff'd sub nom. Holcomb v. Confederated Tribes of Umatilla Indian Reservation,* 382 F.2d 1013 (9th Cir. 1967). *See also Hicks,* 587 F. Supp. at 1165 (trial court opined that the construction of "open and unclaimed lands" that best accommodates Indian hunting as settlement occurs and matures is that "open and unclaimed lands" include public lands put to uses consistent with an Indian hunting privilege).

The State, relying on Hicks, argues that once the hunting regulations with respect to elk went into effect, the use of the Oak Creek Wildlife Area for hunting was not a compatible use and, therefore, the lands were not open and unclaimed. Our acceptance of this argument would permit the State to avoid its burden of proving that regulations imposed on Indian treaty hunters are necessary for conservation purposes. *See Miller,* 102 Wn.2d at 688. The State has designated the Oak Creek Wildlife Area for use for hunting, fishing and recreation. Limits on these activities in the Oak Creek Wildlife Area are by State regulation. The regulations must comply with standards developed by this court and the United States Supreme Court, and be necessary for conservation if the regulations are restrictive of treaty rights. The trial court's

unchallenged finding in this case is that the State has not met its burden in this regard.[8] n8

The State also relies on *State v. Cutler*, 109 Idaho 448, 708 P.2d 853 (1985), to support its argument that lands which are located in a State- owned wildlife area which is operated as a wintering range for elk and deer are not "open and unclaimed." The treaty interpreted in *Cutler* was not a Stevens Treaty and the pertinent language of the treaty provided the Indians had the right to hunt on "unoccupied lands of the United States." The *Cutler* court held that the state wildlife area, which was converted from a privately-owned ranch, was "occupied" by the State of Idaho and that sufficient indicia of occupancy existed (fences, signs, cattle guards, cultivated fields, machinery, roads, campgrounds and buildings) to put the Indian hunters on notice that the land was not "unoccupied lands of the United States." *Cutler,* 109 Idaho at 454. The State offered no evidence in this case that would bring it within the rationale of *Cutler.*

From the rulings in the various cases which discuss the issue, and in light of the treaty language, we discern that a general statement of the rule is that publicly-owned lands, which are not obviously occupied and which are put to a use which is compatible

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[8] Amicus Department of Fish and Wildlife additionally argues that the status of the land changes as regulations of the State change to close, control, restrict or otherwise put land to uses inconsistent with hunting. In essence, the Department argues that the land is open and unclaimed for elk hunting during the State's elk hunting season, but changes its status when State regulation closes the season in that particular area. This argument ignores established law governing when a State, by hunting regulations, can restrict treaty rights. *See Antoine v. Washington,* 420 U.S. 194, 206, 95 S. Ct. 944, 43 L. Ed. 2d 129 (1975); *State v. McCormack,* 117 Wn.2d 141, 143, 812 P.2d 483 (1991).

with hunting, are "open and unclaimed lands" under the terms of the Stevens Treaties. Treaty hunters have a right to hunt on such lands, unrestricted by State regulation, unless the regulations are necessary for conservation purposes. *Miller,* 102 Wn.2d 678, 689 P.2d 81. In this case, the Oak Creek Wildlife Area is publicly owned, is obviously unoccupied, and its purposes are compatible with and, in fact, include hunting. The trial court and Court of Appeals correctly determined that the Oak Creek Wildlife Area is open and unclaimed land.

Finally, the State urges this court to hold that the federal statute creating the State of Washington and admitting the state "into the Union on an equal footing with the original States," Act of February 22, 1889, 25 Stat. 676, 678, impliedly abrogated the treaty hunting rights of Indians living in Washington.

In support of its argument the State primarily relies on *Ward v. Race Horse*, 163 U.S. 504, 16 S. Ct. 1076, 41 L. Ed. 244 (1896), a case in which the Supreme Court held that Congress, in admitting Wyoming to the Union on equal footing with the original states, effectively abrogated the Indian treaty hunting rights of certain treaty Indians in Wyoming. *See also Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995) (applying Race Horse to another treaty applicable to tribes residing within the State of Wyoming); *McCoy,* 63 Wn.2d 421, 387 P.2d 942 (where this court held the treaty fishing rights of Indians who were parties to the Treaty of Point Elliott were impliedly abrogated by Washington's admission to the Union).

After oral argument in this case, the United States Supreme Court effectively overruled Race Horse in *Minnesota v. Mille Lacs,* 119 S. Ct. at 1211 (Rehnquist, C.J., dissenting) (noting the majority's "apparent overruling sub silentio" of *Race Horse*). The Supreme Court rejected use of the equal footing language to find an abrogation of Indian treaty rights, holding "treaty rights are not impliedly terminated upon statehood." *Mille Lacs,* 119 S. Ct. at 1190.

This decision is consistent with the decisions over the past 100 years, since *Race Horse* was decided, in which the Supreme Court has clarified and refined the law governing interpretation and abrogation of Indian treaty hunting and fishing rights. In contrast to the language in *Race Horse*, where the Court discussed the treaty's "grant" of rights to the Indians, the Supreme Court now views the grant as one from the Indians, with a reservation of rights not granted. *Winans,* 198 U.S. at 381; *Fishing Vessel*, 443 U.S. at 680. The Court has further stated that although Congress has the sole power to eliminate a treaty right, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S. Ct. 789, 798, 139 L. Ed. 2d 773 (1998), its intention to abrogate Indian treaty rights must be clear and plain. *United States v. Dion*, 476 U.S. 734, 738, 106 S. Ct. 2216, 90 L. Ed. 2d 767 (1986). Absent explicit statutory language, the Court is "extremely reluctant" to find congressional abrogation of treaty rights. *Fishing Vessel,* 443 U.S. at 690. It therefore will not construe statutes as abrogating a treaty right in a backhanded way but will require "clear evidence that Congress actually considered the conflict between its intended action on the

one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Dion,* 476 U.S. at 739-40.

Furthermore, the Supreme Court has undermined the premise upon which *Race Horse* was decided by holding that "treaty rights to hunt, fish . . . are not irreconcilable with a State's sovereignty over the natural resources in the State." *Mille Lacs*, 119 S. Ct. at 1204. Washington's enabling act, 25 Stat. 676 (1889), differs from the statute admitting Wyoming to the Union, in that the statute admitting Washington reserves from Washington the right to control lands owned or held by any Indian or Indian tribe. 25 Stat. 676-77 (1889). This clause makes it clear that Congress had the Indians' treaty rights in mind when it created the State of Washington, but did not go on to expressly abrogate the treaty hunting rights. Under Dion and Mille Lacs, we are unable to hold that, in the enabling act, Congress impliedly abrogated Indian treaty rights. *Fishing Vessel,* 443 U.S. at 690.

Reversed.

WE CONCUR: Barbara Durham; Charles Z. Smith; Charles W. Johnson; Barbara A. Madsen; Gerry L. Alexander; Philip A. Talmadge; Richard B. Sanders; Visiting Judge James M. Dolliver

STATE OF WASHINGTON, Appellant,

v.

DONALD RAY BUCHANAN, Respondent.

No. 15163-8-III

COURT OF APPEALS OF WASHINGTON

DIVISION THREE

87 Wash. App. 189; 941 P.2d 683

August 5, 1997, Filed

SCHULTHEIS, A.C.J. The Nooksack Indian Tribe is restricted by an 1855 treaty to hunting open and unclaimed lands in the Washington Territory. Donald Buchanan, a Nooksack tribal member, was charged by information with possessing two elk out of season and hunting in a wildlife area without a valid license. The Yakima County Superior Court dismissed the charges on the basis that he had a treaty right to hunt in the wildlife area. On appeal, the State contends the Nooksack tribe has no right to hunt outside their usual and customary hunting grounds, the wildlife area is not open and unclaimed pursuant to the 1855 treaty, and Washington's admission to the Union after ratification of the treaty abrogated the treaty. We affirm.

In January 1995, Mr. Buchanan, his brother and his uncle all Nooksack tribe members were discovered by Department of Fisheries and Wildlife (DFW) officers with two five-point elk. The hunters had killed the elk in the Oak Creek Wildlife Area, owned by the Washington Department of Natural Resources (DNR). By state law, elk hunting in the Oak Creek area was closed at this

time. When the season was open earlier in the fall, a special permit was required to kill anything older than a "spike bull."

In response to the DFW officers' questions, Mr. Buchanan and his relatives displayed their identification and elk tags issued by the Nooksack tribe. Mr. Buchanan did not have a valid Washington hunting license due to a prior elk hunting violation. Although the hunters claimed they could hunt anywhere in the state, the DFW officers understood that the Nooksack tribe had no treaty rights east of the Cascade Mountains. The officers impounded the elk as evidence and cited the hunters. Mr. Buchanan was charged by information with two counts of possession of big game during a closed season[1] and one count of hunting while licensed revoked.[2]

Mr. Buchanan moved for dismissal of the charges on the ground that he was lawfully exercising his subsistence hunting rights under the Point Elliott Treaty of 1855. At the hearing on the motion in August 1995, the State argued that treaty rights were limited to land ceded by the tribe and to normal and accustomed hunting grounds. Additionally, the State asserted Mr. Buchanan had violated Nooksack tribal regulations and state hunting regulations that were applicable to treaty hunters. The superior court judge dismissed the charges. This appeal followed.

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[1] RCW 77.16.020(1); 77.21.010(1) (second or subsequent violation). This is a class C felony with a maximum penalty of five years and/or a fine of $10,000. RCW 9A.20.021.

[2] RCW 77.21.060(2). This is a misdemeanor with a maximum penalty of 90 days and/or a fine of $500. RCW 77.21.010(2).

None of the facts related above are in dispute; what is disputed is the trial court's conclusion, as a matter of law, that Mr. Buchanan had a treaty right to hunt in the Oak Creek Wildlife Area. The State first argues the treaty reserved hunting rights only on land ceded by the tribe, originally owned by the tribe, or on a traditional tribal hunting ground.

A treaty between the United States and an Indian tribe is essentially a contract between sovereign nations. *Washington v. Washington State Commercial Passenger Fishing Vessel Assn*, 443 U.S. 658, 675, 99 S. Ct. 3055, 61 L. Ed. 2d 823, *modified on other grounds sub nom. Washington v. United States,* 444 U.S. 816, 100 S. Ct. 34, 62 L. Ed. 2d 24 (1979). Ambiguous treaty language must be resolved in favor of the Indians. *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 631, 90 S. Ct. 1328, 25 L. Ed. 2d 615 (1970); *Department of Ecology v. Yakima Reservation Irrig. Dist.,* 121 Wash. 2d 257, 277, 850 P.2d 1306 (1993). Further, treaty language must be construed, not according to its technical legal meaning, but in the sense that would naturally be understood by the *Indians. Passenger Fishing Vessel,* 443 U.S. at 676.

In the Point Elliott Treaty of 1855, many western Washington tribes, including the Nooksack,[3] ceded land from the Puget Sound area to the western summit of the Cascade Mountain range. In return, the United States government in Article 5 of the treaty secured the tribes rights of taking fish at usual and accustomed

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[3] Although the Nooksack are not mentioned by name in the treaty, it has been established that the treaty pertains to them. *United States v. Washington,* 459 F. Supp. 1020, 1041 (W.D. Wash. 1978).

grounds and stations . . . together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. The Oak Creek Wildlife Area lies east of the Cascades, outside the ceded land.

Contrary to the States argument, the Point Elliott treaty, by its express terms, does not limit hunting rights to the ceded lands or to traditional hunting grounds. Although fishing is reserved only on usual and accustomed grounds and stations, hunting rights extend anywhere in the territory that is open and unclaimed. Cases cited by the State are inapposite. In *Oregon Dept of Fish & Wildlife v. Klamath Indian Tribe,* 473 U.S. 753, 105 S. Ct. 3420, 87 L. Ed. 2d 542 (1985), for example, the Supreme Court dismissed a tribes assertion that it was entitled to hunt and fish on ceded lands. The treaty in question reserved no rights to hunt or fish outside the reservation. *Id.* at 755. The Point Elliott treaty, in contrast, specifically reserves such rights. In *United States v. Washington,* 384 F. Supp. 312, 331 (W.D. Wash. 1974), *affd,* 520 F.2d 676 (9th Cir. 1975), *vacated sub nom. Passenger Fishing Vessel,* 443 U.S. 658, 61 L. Ed. 2d 823, 99 S. Ct. 3055, the court construes language similar to that found in the Point Elliott treaty: the right of taking fish, at all usual and accustomed grounds and stations . . . . Any interpretation of that language requires a delineation of the traditional fishing grounds. A reservation of the right to hunt all open and unclaimed lands, however, clearly does not limit hunting to such traditional areas.[4]

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[4] *Strong v. United States,* 207 Ct. Cl. 254, 518 F.2d 556 (Ct. Cl. 1975) is cited by the State to support its contention that a tribe member must prove aboriginal title,

This leads us to the interpretation of open and unclaimed lands within the meaning of the treaty. The State contends the Oak Creek Wildlife Area is no longer open and unclaimed because it is owned by the government and operated in the winter for purposes inconsistent with hunting, citing *United States v. Hicks,* 587 F. Supp. 1162, 1165-66 (W.D. Wash. 1984).

Several courts, including Washington's, have determined that national park lands are open and unclaimed within the meaning of treaties similar to Point Elliott. *See, e.g., Confederated Tribes v. Maison,* 262 F. Supp. 871, 873 (D. Or. 1966), *affd sub nom. Holcomb v. Confederated Tribes,* 382 F.2d 1013 (9th Cir. 1967); *State v. Miller,* 102 Wash. 2d 678, 680 n.2, 689 P.2d 81 (1984); *State v. Chambers,* 81 Wash. 2d 929, 506 P.2d 311 (1973). Such public lands, unoccupied by settlers, are open and unclaimed insofar as they are put to uses consistent with Indian hunting privileges. *Hicks,* 587 F. Supp. at 1165.

The Olympic National Park, subject of the Hicks decision, was permanently closed to elk hunting due to the governments interest in protecting endangered Roosevelt elk populations. As such, the parks purpose was inconsistent with Indian hunting rights and therefore could not be considered open and unclaimed land. *Hicks,* 587 F. Supp. at 1166. Here, however, the Oak Creek Wildlife Area is open to elk hunting periodically, so it passes the threshold test of open and unclaimed land under the treaty.

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i.e., actual, exclusive and continuous use of the land for a long time. Strong, however, is a court of claims case wherein the Delaware and Shawnee tribes demanded compensation for lands they claimed they relinquished in eighteenth century treaties. Aboriginal title had to be proven in order to support the claims.

Even so, Nooksack hunting rights under the treaty are not unlimited. Although the United States Supreme Court has construed treaty rights broadly, protecting Indians from encroachment by state governments, the court has also recognized a states power to regulate game within its borders. *Miller,* 102 Wash. 2d at 681-82 (*citing Menominee Tribe v. United States,* 391 U.S. 404, 88 S. Ct. 1705, 20 L. Ed. 2d 697 (1968); *Baldwin v. Fish & Game Commn,* 436 U.S. 371, 391, 98 S. Ct. 1852, 56 L. Ed. 2d 354 (1978); *Antoine v. Washington,* 420 U.S. 194, 206-07, 95 S. Ct. 944, 43 L. Ed. 2d 129 (1975)). State wildlife regulations are applicable to the tribes as long as the regulations meet certain tests: the State has the affirmative burden of proving (1) the regulations are reasonable and necessary for conservation purposes, and (2) their application to Indians covered by the treaty is necessary for conservation. *Miller,* 102 Wash 2d at 687. Within this context, a necessary regulation is one required for the perpetuation of a species of game within a certain zone. *Id.* at 687-88. A regulation is reasonable if it is appropriate to its conservation purpose. *Id.* at 688.

As the trial court properly found here, the State did not meet its burden of showing that the Oak Creek elk hunting regulations were necessary as applied to the Nooksack tribe. The State did not assign error to the courts findings that the tribe consists of no more than 450 individuals, yet over 30,000 non-tribal hunters are licensed to hunt in the Yakima area. No evidence was produced to show the number of elk killed by tribal hunting or to show any

impact of the tribe's subsistence and ceremonial hunting[5] n5 on the Oak Creek elk population. A DFW wildlife biologist testified that although recent restrictions on hunting mature males were designed to increase the number of bulls, there were no immediate threats to the elk population.

On balance, the State failed to show that it was necessary to apply the licensing restrictions to the Nooksack tribe in order to perpetuate the Oak Creek elk population. Evidence offered on appeal, that a winter feeding station in the area is necessary to protect the elk, was not presented at trial and is not properly before this court. *Nelson v. McGoldrick,* 127 Wash. 2d 124, 141, 896 P.2d 1258 (1995). At any rate, this evidence does not establish that the closure to hunting by the Nooksacks is necessary to perpetuate the species.

In its final argument, the State contends the Point Elliott treaty was abrogated by Washington's subsequent admission to the Union. This argument was not presented to the trial court, is not asserted to be of constitutional magnitude, and is not considered on appeal. *Richmond v. Thompson,* 130 Wash. 2d 368, 384, 922 P.2d 1343 (1996). In any event, it is settled that Washington's admission into the Union imposed on the state, equally with other states, the obligation to observe and carry out the provisions of treaties of the United States. *United States v. Washington,* 384 F. Supp. 312, 401 (W.D. Wash. 1974), *affd,* 520 F.2d 676 (9th Cir.

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[5] Nooksack tribal regulations restrict elk hunting to subsistence and ceremonial needs, one elk per day and four elk per family each year. The State does not contend on appeal that Mr. Buchanan violated the tribal hunting regulations.

1975), *vacated on other grounds sub nom. Washington v. Washington State Commercial Passenger Fishing Vessel Assn,* 443 U.S. 658, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979).

Affirmed.

Thompson and Kurtz, JJ., concur.

Reconsideration denied September 2, 1997.

Review granted at 134 Wn.2d 1012 (1998).

Hon. Heather K. Van Nuys

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff,	)	NO. 95-1-00124-1
v.	)	
DONALD BUCHANAN Defendant.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING ORDER AND JUDGMENT OF DISMISSAL

THIS MATTER having come on regularly for hearing before the undersigned Judge of the above-entitled court on August 17, 1995, the plaintiff State of Washington appearing by and through Yakima County Deputy Prosecutor Kenneth L. Ramm, the defendant appearing personally and by and through his attorney, David S. Vogel, and the court having examined the records and files herein and having considered defendant's Motion to Dismiss and attached exhibits; the five treaties submitted to the court by defendant (Potowatomi Treaty 1826, Miami Treaty 1826, Chippewa Treaty 1829, Pawnee Treaty 1833, Ottawa Treaty 1836); the testimony of Department of Fisheries and Wildlife ("DFW") Enforcement Officer Robert Lamb; the testimony of DFW Regional Wildlife Biologist Roger McKeel; and the

stipulated testimony of defendant Donald Buchanan, and being fully advised, makes and enters the following:

FINDINGS OF FACT

1. On January 6, 1995, defendant Donald Buchanan, his brother Albert and uncle Randy Ross were stopped by DFW enforcement officers with two recently killed branch-antlered bull elk in their possession on land owned by the Washington Department of Natural Resources ("DNR"), east of the summit of the Cascade range, 4.3 miles up the 1400 road of Oak Creek. As Buchanan explained to the officers at the time, he is an enrolled member of the Nooksack Indian Tribe, and was hunting for subsistence purposes.

2. At the time of the alleged offense, Buchanan's non-tribal hunting privileges were revoked, and the non-tribal season was closed. Buchanan was charged with two counts of violating RCW 77.16.020(1)(E), which prohibits possessing big game during the closed season, and one count of violating RCW 77.21.60(2), for hunting while his Washington hunting license was revoked. During the preceding non-tribal season hunters were not allowed to kill branch-antlered elk without a special permit.

3. The Nooksak Indian Tribe, which is a party to the Point Elliott Treaty of 1855[1], has approximately 450 enrolled members. The Nooksak Tribe regulates hunting by its members through its Hunting Regulations and Hunting Code. The 1994-95 Hunting Regulations have a combined bag limit for deer and elk of four

animals per house for subsistence purposes. At the time of the alleged offense, defendant Buchanan possessed valid tribal tags to hunt branch-antlered bull elk for subsistence purposes in the area in question. Buchanan told the DFW officers that he was hunting pursuant to his tribal rights under the Point Elliott Treaty. There is no evidence that the defendant was hunting for any non-subsistence purpose.

4. Article V of the Point Elliott Treaty, which has never been abrogated, reads in part:

> The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands; provided, however, that they shall not take shell fish from any beds stated or cultivated by citizens.

5. Prior to its drafting the Point Elliott Treaty, the United States Government had drafted numerous treaties with Indian Tribes and Nations. In a number of these treaties, including the Potowatomi Treaty 1826 (Article 7), Miami Treaty 1826 (Article 8), Chippewa Treaty 1829 (Article VII), Pawnee Treaty 1833 (Article II), and Ottawa Treaty 1836 (Article Thirteenth), the hunting privileges of the Indians were restricted to the lands ceded by the Indians to the United States. The terms of the Point Elliott

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[1] This fact was established in United States v. Washington, 459 F. Supp. 1020, 1041 (W.D. Wash. 1978).

Treaty of 1855 restrict the privilege of hunting to "open and unclaimed lands" in the Territory of Washington but do not restrict tribal hunting to ceded lands.

6. The language of the Point Elliott Treaty geographically restricts the right of taking fish to "usual and accustomed grounds and stations," but does not geographically limit the privilege of hunting to traditional hunting grounds.

7. The Oak Creek area is east of the territory ceded to the United States by the Nooksak Indian Tribe under the Point Elliott Treaty. The ceded territory is bordered on the east by the summit of the Cascade range.

8. The DNR land in the Oak Creek area where Buchanan was cited is within DFW's Bethel Hunting Unit 360 in Yakima County. It is publicly-owned land kept open to the public for hunting, fishing, and recreational purposes. All of the uses to which this land is put are compatible with Indian hunting. For purposes of the Point Elliott Treaty, it must be considered "open and unclaimed."

9. According to statistics kept by DFW, there are presently about 97,000 non-tribal licensed elk hunters in the State of Washington, and more than 30,000 of these hunt in the Yakima area. The State did not produce any information regarding the number of tribal hunters in the State of Washington, the number Point Elliott Treaty hunters in the State, or the number of hunters in the Nooksak Tribe. The State did not produce any evidence regarding the number of elk kills by tribal hunters in the State of Washington, by Point Elliott Treaty hunters, or by hunters in the Nooksak Tribe. There was not sufficient evidence that Nooksak

hunters or Point Elliott Treaty hunters, hunting for subsistence or ceremonial purposes, can have a significant impact on the elk population in the Oak Creek or Yakima County area.

10. On March 17, 1995, two members of the Yakama Indian Nation killed a branch-antlered bull elk nearby where Buchanan was cited. After that incident, Bob Schafer, Yakima regional chief enforcement officer (a speaking agent) for DFW stated, "Tribal hunters actually kill very few elk off the reservation, and that number is really inconsequential to management purposes." According to the testimony of DFW Regional Wildlife Biologist Roger McKeel, there is no immediate threat to the preservation of the elk population in Bethel Hunting Unit 360.

11. Insofar as the State has not produced any evidence that either the Nooksak hunters or all of the Point Elliott Treaty hunters are capable of having a significant impact, when hunting for subsistence or ceremonial purposes, on the elk population in the Oak Creek area, the Yakima County area, or in the State of Washington, the State has failed to sustain its burden of proving that the application of its regulations to Nooksak Indians or to Point Elliott Treaty hunters is necessary for conservation.

CONCLUSIONS OF LAW

1. Washington State is bound by the supremacy clause of the United States Constitution (Art. VI, cl. 2) to respect the terms of the Point Elliott Treaty of 1855, which has never been abrogated by the Federal Government. See Antoine v. Washington, 420 U.S. 194, 204, 43 L. Ed. 2d 129, 95 S.Ct. 944 (1975); State v. Miller, 102 Wn. 2d 678, 681, 689 P.2d 81 (1984).

2. In interpreting Indian treaties, courts are required to construe the treaties liberally in favor of the Indians. Choctaw Nation v. United States, 318 U.S. 423, 431-32, 87 L. Ed. 2d 877, 63 S.Ct. 672 (1943). Ambiguous treaties must be resolved in favor of Indians. Winters v. United States, 207 U.S. 564, 576-77, 52 L. Ed. 340, 28 S. Ct. 207 (1908); Ecology v. Yakima Reservation Irrig. Dist., 121 Wn.2d 257, 277, 850 P.2d 1306 (1993).

3. The Point Elliott Treaty of 1855 restricts the privilege of hunting to "open and unclaimed lands" in the Territory of Washington but does not restrict tribal hunting to ceded lands and does not geographically limit the privilege of hunting to traditional hunting grounds. The language of this treaty must be contrasted with the language of the treaties referred to in this Court's Finding of Fact 5, which specifically restricted the hunting privileges of the Indians to the ceded lands. Moreover, the treaty's restriction on the right of taking fish "at usual and accustomed grounds and stations" does not apply to the privilege of hunting. See State v. Chambers, 81 Wn. 2d 929, 935-36, 506 P.2d 311 (1973); United States v. Washington, supra, 384 F. Supp at 350-51 (Finding of Fact 4); State v. Tinno, 497 P.2d 1386, 1391, 1393, 1395 (Idaho 1972). In construing this treaty pursuant to the above-stated rules of interpretation, this Court cannot add geographic restrictions that were not included in the language of the treaty.

4. "Open and unclaimed lands" include public lands, such as the DNR land involved in this case, put to uses compatible with an Indian hunting privilege. United States v. Hicks, 587 F. Supp. 1162, 1165 (W.D. Wash. 1984).

5. The State Department of Fisheries and Wildlife can regulate Indian hunting pursuant to the police power if the State can affirmatively demonstrate that at the time the treaty hunting right was asserted by the defendant: (1) the regulations at issue were both reasonable and necessary for conservation; and (2) the regulations' application to Indians covered by the treaty was necessary to conservation. A "necessary" regulation, within this context, is a regulation required for the perpetuation of a species of game within a certain zone. A regulation is reasonable if it is appropriate to its conservation purpose. State v. Miller, 102 Wn.2d 678, 687-88, 689 P.2d 81 (1984); see United States v. Washington, 384 F. Supp. 312, 342, 402-404 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); see also Antoine v. Washington, supra, 420 U.S. at 207; Felix S. Cohen's Handbook of Federal Indian Law 461 (1982).

6. The State of Washington has failed to demonstrate that application of the hunting regulations at issue in this case to the Nooksak Indian hunters or to the Point Elliott Treaty hunters was or is necessary for conservation.

7. Defendant was validly exercising his privilege to hunt under the Point Elliott Treaty of 1855, so the charges against him must be dismissed.

DATED this 17th day of November, 1995.

Honorable Heather K. Van Nuys

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D1

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Appellant, v. DONALD RAY BUCHANAN, Respondent.	)	NO.66054-9 ORDER DENYING MOTION FOR RECONSIDERATION

The Court having considered the Respondent's Motion for Reconsideration;

Now, therefore, it is hereby

ORDERED:

That the Respondent's Motion for Reconsideration is denied.

DATED at Olympia, Washington this 3rd day of August, 1999.

/s/Smith, J.

for CHIEF JUSTICE

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TREATY WITH THE DWAMISH, SUQUAMISH, ETC., (TREATY OF POINT ELLIOTT)

Jan. 22, 1855

Articles of agreement and convention made and concluded at Múckl-te-óh, or Point Elliott, in the Territory of Washington, this twenty-second day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, head-men and delegates of the Dwámish, Suquámish, Sk-táhl-mish, Sam-áhmish, Smalh-kamish, Skope-áhmish, St-káh-mish, Snoquálmoo, Skai-wha-mish, N'Quentl-má-mish, Sk-táh-le-jum, Stoluck-whá-mish, Sno-ho-mish, Skágit, Kik-i-állus, Swin-á-mish, Squin-áh-mish, Sah-ku-méhu, Noo-whá-ha, Nook-wa-cháh-mish, Mee-sée-qua-guilch, Cho-bah-áh-bish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes, and duly authorized by them.

ARTICLE 1. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence eastwardly, running along the north line of lands heretofore ceded to the United States by the Nisqually, Puyallup, and other Indians, to the summit of the Cascade range of mountains; thence northwardly, following the summit of said range to the 49th

parallel of north latitude; thence west, along said parallel to the middle of the Gulf of Georgia; thence through the middle of said gulf and the main channel through the Canal de Arro to the Straits of Fuca, and crossing the same through the middle of Admiralty Inlet to Suquamish Head; thence southwesterly, through the peninsula, and following the divide between Hood's Canal and Admiralty Inlet to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded as aforesaid to Point Southworth, on the western side of Admiralty Inlet, and thence around the foot of Vashon's Island eastwardly and southeastwardly to the place of beginning, including all the islands comprised within said boundaries, and all the right, title, and interest of the said tribes and bands to any lands within the territory of the United States.

ARTICLE 2. There is, however, reserved for the present use of occupation of the said tribes and bands the following tracts of land, viz: the amount of two sections, or twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison, called the Indians Noo-sohk-um; the amount of two sections, or twelve hundred and eighty acres, on the north side Hwhomish Bay and the creek emptying into the same called Kwilt-seh-da, the peninsula at the southeastern end of Perry's Island, called Sháis-quihl, and the island called Chah-choo-sen, situated in the Lummi River at the point of separation of the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia. All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor

shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, ; if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them.

ARTICLE 3. There is also reserved from out the lands hereby ceded the amount of thirty-six sections, or one township of land, on the northeastern shore of Port Gardner, and north of the mouth of Snohomish River, including Tulalip Bay and the before-mentioned Kwilt-seh-da Creek, for the purpose of establishing thereon an agricultural and industrial school, as hereinafter mentioned and agreed, and with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade Mountains in said Territory. *Provided, however,* That the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians.

ARTICLE 4. The said tribes and bands agree to remove to and settle upon the said first above-mentioned reservations within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the mean time it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ARTICLE 5. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the

privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens.

ARTICLE 6. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of one hundred and fifty thousand dollars, in the following manner—that is to say: For the first year after the ratification hereof, fifteen thousand dollars; for the next two year, twelve thousand dollars each year; for the next three years, ten thousand dollars each year; for the next four years, seven thousand five hundred dollars each years; for the next five years, six thousand dollars each year; and for the last five years, four thousand two hundred and fifty dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may, from time to time, determine at his discretion upon what beneficial objects to expend the same; and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE 7. The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to the said general reservation, or such other suitable place within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause

the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor.

ARTICLE 8. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE 9. The said tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, of if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and the other Indians to the Government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases

of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 10. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribe who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE 11. The said tribes and bands agree to free all slaves now held by them and not to purchase or acquire others hereafter.

ARTICLE 12. The said tribes and bands further agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE 13. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of fifteen thousand dollars to be laid out and expended under the direction of the President and in such manner as he shall approve.

ARTICLE 14. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for a period of

twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the like term of twenty years to instruct the Indians in their respective occupations. And the United States finally agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

ARTICLE 15. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

Isaac I. Stevens, Governor and Superintendent. [L.S.]

82 Named chiefs, headmen and delegates of the aforesaid tribes and bands of Indians affix their x marks. [L.S. x 82]

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EXCERPTS OF TREATIES

TREATY WITH THE POTAWATOMI, 1826

ARTICLE 7.

The Potawatomie Indians shall enjoy the right of hunting upon any part of the land hereby ceded, as long as the same shall remain the property of the United States.

TREATY WITH THE MIAMI, 1826

ARTICLE 8.

The Miami tribe shall enjoy the right of hunting upon the land herein conveyed, so long as the same shall be the property of the United States.

TREATY WITH THE CHIPPEWA, ETC., 1829

ARTICLE VII.

The right to hunt on the lands herein ceded, so long as the same shall remain the property of the United States, is hereby secured to the nations who are parties to this treaty.

TREATY WITH THE PAWNEE, 1833

ARTICLE II.

The land ceded and relinquished hereby, so far as the same is not and shall not be assigned to any tribe or tribes, shall remain a common hunting ground, during the pleasure of the President, for the Pawnees and other friendly Indians, who shall be permitted by the President to hunt on the same.

TREATY WITH THE OTTAWA, ETC., 1836.

ARTICLE THIRTEENTH.

The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Court File No. 3-94-1226

Mille Lacs Band of Chippewa Indians
Arthur Gahbow, Walter, Sutton,
Carleen Benjamin, and Joseph Dunkley

Plaintiffs,

United States of America,

Plaintiff-Intervenor,

St. Croix Chippewa Indian, et al.,
Lac Du Flambeau Band, et al.
Bad River Bank of Lake Superior, et al.
Lac Courte Oreilles Indians, et al.
Sokaogan Chippewa Community, et al.
Red Cliff Band of Lake Superior, et al.

Plaintiff-Intervenors,

v.

State of Minnesota, Minnesota Department of Natural Resources, and Rod Sando, Commissioner of Natural Resources,

Defendants,

County of Aitkin, Benton, et al.,
John W. Thompson, et al.

Defendant-Intervenors,

Save Lake Mille Lacs Association,

Amicus Curiae

MEMORANDUM[1]
OPINION AND ORDER

(Filed Mar. 1996)

[1] Unedited Excerpt of Opinion

13. Right of Wisconsin Bands to Exercise Usufructuary Rights in Minnesota

The Landowners and the Counties argue that the Wisconsin Bands do not hold usufructuary rights in the Minnesota portion of the 1837 ceded territory because none of the Wisconsin Bands used and occupied the area at treaty times. The Wisconsin Bands contend that the treaty expressly guarantees all the signatory bands the privilege of hunting, fishing and gathering throughout the ceded territory and that nothing in the treaty suggests that a particular band must prove its historical use of a particular portion of the ceded territory before exercising its rights there.

The Landowners and Counties do not, and cannot, point to any language in the 1837 Treaty that limits the usufructuary rights granted to certain areas within the ceded territory. Nor does the case law support the argument.

The power of Congress to establish or recognize rights or reservations for Indian tribes does not derive from the Indians' aboriginal title to lands, it derives from the Constitution. *See Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 87-88 (1981); *Voigt, 700 F.2d at 352.* The Counties' reliance on *Winans, supra, Suefert Bros. Co. v. United States*, 249 U.S. 753 (1919) and *United States ex rel Charlie v. McGowan*, 62 F.2d 955, *aff'd* 290 U.S. 592 (1933) is misplaced as those cases involved treaties that granted rights for the taking of fish "at all the usual and accustomed grounds and stations." As this language suggests,

the rights granted under these treaties was limited to those areas historically used by the Indians.

In this case, the 1837 treaty only limited the exercise of usufructuary rights to areas within the ceded territories. The treaty does not contain any language restricting the right to hunt, fish or gather within certain areas within the ceded territory.

As noted by the Bands in opposition to this motion, in the *Voigt* litigation the court has recognized the bands' right to hunt, fish and gather throughout the entire ceded territory, and that no restrictions have been placed upon the bands as to historic use or occupancy on their usufructuary rights. In *Lac Courte Oreilles Chippewa Indians v. State of Wisconsin*, 653 F.Supp. 1420, 1424 (W.D. Wis. 1987), the court recognized that the Chippewa were divided into separate bands and such bands occupied a fairly distinct territory.

> The territories were based on use by a family or a group of families or by the natural resources of the territory. The roving habits of the Chippewa as a whole and the Chippewa's territoriality tended to disperse the Indian population in the ceded territory while avoiding the exhaustion of natural resources. This dispersal diminished, however, as the Chippewa became increasingly involved in trade.
>
> * * *
>
> As among Chippewa members, the Chippewa economy was a system of reciprocity. An important element of this system was sharing. The scarcer a resource became, the more willing the Chippewa were to share it.

And in *Lac Courte Oreilles Chippewa Indians v. State of Wisconsin*, 740 F.Supp. 1400, 1418 (W.D. Wis. 1990), with respect to allocation of resources, the court held that the Indians were required to take their 50% share throughout the ceded territory – that they could not concentrate in a particular area.

The Landowners' assert a number of arguments in support of this motion without legal support. The Court has reviewed the arguments and finds they have no merit. Absent clear language limiting the Chippewa to exercise their usufructuary rights only in the areas they occupied, this motion must be denied.

IT IS HEREBY ORDERED that:

1. Magistrate Judge Lebedoff's Order dated July 24, 1995 is AFFIRMED.

Date: 3-29-96

/s/ Michael J. Davis
Judge Michael J. Davis
United States District Court

FISH AND WILDLIFE COMMISSION

POLICY DECISION[1]

POLICY TITLE: Tribal Hunting Coordination	
POLICY NUMBER:	C-3607
Cancels: N/A	Effective Date: April 3, 1998
	Termination Date (if applicable): N/A
See Also:	Approved by: _____

The Washington Fish and Wildlife Commission acknowledges and respects the sovereign status of Washington's federally recognized tribes. The overlapping nature of state and tribal jurisdiction and responsibilities cerates a co-management relationship in which it is essential that the parties work together. The Commission recognizes that the preservation of healthy, robust, and diverse fish and wildlife populations is largely dependent on the state and the tribes working in a cooperative and collaberative manner. The Washington Fish and Wildlife Commission is committed to a cooperative management relationship with the tribes. In the spirit of these acknowledgments, the Commission adopts the following policies to guide Department staff in their relationships with the tribes:

1. The Department of Fish and Wildlife will work cooperatively with representatives of each tribal government in an effort to

[1] This Policy Decision was attached as App. F to the amicus brief filed by "Several Treaty Tribes In Support of Respondent" in the Washington Supreme Court.

resolve all issues through direct communication and negotiation.

2. The Department of Fish and Wildlife supports tribal self-regulation and determination.
3. The Department of Fish and Wildlife will engage tribal representatives in its decision making processes relative to wildlife management issues that affect tribal hunting.
4. The Department of Fish and Wildlife commits to work jointly with the tribes in the development of an information and data exchange system that enhances the parties' ability to effectively communicate and collectively identify resource and hunting issues and concerns.
5. The Department of Fish and Wildlife, in cooperation with tribal governments, will develop enforcement protocols to guide Department officers in their contact with tribal hunters.

The [Tacoma] News Tribune
Published: 01-16-98
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COURT RULING ON HUNTING BRINGS TRIBES, STATE TO TABLE / OFFICIALS FROM BOTH SIDES GATHER IN SEATAC TO TALK ABOUT WORKING TOGETHER TO MANAGE DEER AND ELK

Byline: Rob Carson; The News Tribune

State wildlife officials met with representatives of 30 Northwest Indian tribes Thursday to begin working on new hunting management agreements that are expected to give Indian hunters broad new freedom in when and where they kill deer and elk.

After the 5-hour meeting - which was closed to the public - participants said they had covered only preliminaries and had not resolved how the state and tribes will manage big-game populations and work across jurisdictions to control hunters.

"This was the first of what we hope will be a number of meetings with tribal delegates," said Bern Shanks, director of the state Department of Fish and Wildlife. "We're beginning to do something we should have done a long time ago - work together and build a day-to-day relationship."

Shanks said the private meeting with the tribes was prompted by a state appeals court opinion holding that 19th-century treaties give tribal members the right to hunt on open and unclaimed land anywhere in the state - not just on their own reservations.

State restrictions on when and where hunting may occur, and on what types of animals may be taken, do not necessarily apply to the tribes, a three-judge appeals panel said in an August review of a Yakima County Superior Court decision.

At the request of the tribes, Thursday's meeting - at the Holiday Inn in SeaTac - was open to invited participants only.

About 80 tribal representatives, their attorneys and two dozen wildlife department officials attended, but news reporters and members of the public were turned away at the door.

The fact that non-Indian hunters were not allowed a voice at the meeting infuriated some non-Indian hunters, who fear unrestricted Indian hunting will destroy the state's deer and elk herds.

One non-Indian hunter excluded from the meeting, James Brummett of Kent, appeared at the hotel dressed as General George Custer. He carried a sign that read, "Will the deer and elk go the way of the buffalo?" "General Custer died for his cause," Brummett said. "I'm willing to die for my cause - to protect the deer and the elk."

Brummett, wearing shoulder-length blond hair and a buckskin suit, was wrapped in chains and padlocks. He threatened to chain himself inside the meeting room in protest, but after about 15 minutes he allowed himself to be escorted away by SeaTac police.

After the meeting, tribal representatives said they were at least as concerned as state officials about the health of the elk herds and have no intention of allowing their members to endanger the resource. Rick Peters, natural resources director of the Squaxin Island Tribe, said the appeals courts' decision recognizes a right that predated the treaties - and that the tribes never gave up.

"But it also gives the tribes the responsibility to formulate good tribal hunting management plans," Peters said.

The decision, known as the Buchanan case, involved a member of the Nooksack Tribe - Donald Buchanan - who was charged with possessing two elk out of season and hunting in a state wildlife area without a valid license. The Nooksack are a Northwest Washington tribe, and Buchanan had been hunting in a closed Department of Fish and Wildlife Area near Yakima on the other side of the Cascades.

Buchanan argued that his hunting rights were protected by treaty, and, so far, the courts have agreed. The Yakima County prosecuting attorney has asked the state Supreme Court to review the appeals court's decision. The Supreme Court is expected to decide in March whether to hear the case, according to Rob Costello, the assistant attorney general who represents the state wildlife department.

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Opinion/Editorials

CALMLY CONSIDER TRIBAL HUNTING RIGHTS, RULES

AN overblown early reaction to tribal hunting rights in Washington has left the impression that treaty tribes can take big game anywhere, any time. Before the anger goes any further, responsible hunters should pause and watch how negotiations will put to rest the rumors and suspicions over uncontrolled hunting.

Based on the recent State vs. Buchanan decision, Washington's tribal members have a right to hunt without license on previously hunted land throughout the state. The decision may be heard by the State Supreme Court, but the early ramifications appear stark. The Yakima County Superior Court ruled that two members of the Nooksack tribe who traveled to Eastern Washington and killed two bull elk were not hunting illegally even though far from their tribal lands. The court said any tribal member has a right to hunt in open and unclaimed lands within the former Washington Territory.

The state's highly regulated and licensed non-Native hunters are aghast. Instead of tribal hunting rights limited to traditional locales, they imagine the spectre of rapacious hunting of elk, deer and other species on all public lands. So far, that sounds like alarmism instead of reality.

The state Fish and Wildlife Commission has begun negotiations with more than 20 tribes over cooperative hunting agreements. While "open and unclaimed" lands invoked in the decision are still a gray area, the state has always maintained that park lands and other areas not already hunted will not be hunted by anyone. Hunters should also keep in mind that hunting patterns reported by the state Commission show tribal harvests of elk and deer are minuscule compared to non-Native hunters.

Statewide, tribal hunters took 286 elk during 1995-96 compared with 6,429 elk harvested by non-tribal hunters. On the eastern side of the Cascades, the tribal elk kill was none - zero - reported, compared with 3,099 for non-tribal hunters. For both tribal and non-tribal hunters combined, the yearly kill of deer and elk is sliding down, caused by a variety of factors from

encroachment to fewer hunters. In 1995, hunters took 39,505 deer, the lowest number in a decade, and 6,715 elk, again the lowest number since 1987.

The issue for Washington hunters is not tribal hunters raising their take from zero to a few hundred, but the larger questions of hunting's general decline from habitat loss and urbanization of once-rural lands.

A few tribal-related hunting incidents have not helped the argument and give added reason to include the tribes in wildlife management and enforcement.

The notorious case of five elk found shot and meat wasted along a highway is cited as senseless tribal mismanagement. Elk shot on the Mount St. Helens reserve is another. Killing elk in the wide-open river valley beneath the visitor's overlook is a reckless abuse of traditional hunting rights, like carrying a shotgun into Disneyland.

Many licensed hunters have long ago reached a mental compact with tribal hunters. The unspoken agreement is that the tribes have a historic and iron-clad treaty right to use the land and waters once solely theirs. But open abuse, such as shooting placid elk at a feeding station, destroys the hunting ethic for native and non-native alike.

That underlying covenant can drive an agreement that accepts the Buchanan decision, but only if tribes incorporate broader, self-imposed regulations. Some tribes - usually those not close to prime hunting land - do not report their harvests. Their compliance in recording total harvests would be welcome. Similarly, helping with enforcement against blatant hunting abuses is a role the tribes could embrace. Following Buchanan, the tribes' freedom to hunt carries with it the burden of responsibility.

Demonizing the tribes makes little sense. Statistics of tribal hunting vs. total harvest show there aren't enough Indians in the state to kill off the elk herd.

Game management that recognizes tribal rights and encourages all forms of hunting is the best way to keep hunting alive in Washington and stave off anti-hunting referendums. The sport's fervid detractors and land encroachment are hunting's true enemies.

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Page A1

AN UPHEAVAL OVER WHO HUNTS WHERE / CONFLICT OVER TRIBAL RIGHTS SUGGESTS TO SOME THAT BOLDT III MAY BE ON ITS WAY.

Byline: Rob Carson; The News Tribune

As the debate over Indian hunting rights intensifies, many see the dispute as an almost certain beginning to Boldt III - a sequel to the historic court decisions that upended Washington's fishing and shellfish industries.

The issue goes beyond big-game hunting. At deeper levels, the conflict is about tribal sovereignty and trust, not only between Indians and non-Indians but among Washington's 26 tribes.

Efforts to solve the conflict are developing on several levels, too.

The latest came Tuesday in Chehalis, where U.S. Rep. Linda Smith (R-Hazel Dell) announced she intends to introduce legislation in Congress next week that she said would even the playing field among Indian hunters and non-Indian hunters.

Smith's proposal comes as the state is three months deep into negotiations with the tribes, trying to find a compromise that will keep the hunting issue out of federal court and calm racial disputes during hunting season this fall.

Representatives of Washington's tribes sat down Wednesday with state game managers at the Swinomish Casino near La Conner - it was their third meeting so far - and progress was predictably slow. Under Smith's proposal - called the Deer and Elk Protection Act - Washington tribes no longer would have special privileges to hunt deer and elk off their reservations. State hunting laws would regulate all hunters, Indian and non-Indian alike.

"This is a fair and equitable way to meet the game-conservation goals of this state," Smith said. "We're all citizens of

this state, and we all have to take responsibility for safety and conservation."

Tribal leaders dismissed Smith's legislation as political grandstanding. It endangers the continuing negotiations with the state, they say, and increases chances that the hunting controversy will have to be resolved in federal court.

"It's just another attempt to rewrite the treaties," said Tony Meyers, a spokesman at the Northwest Indian Fisheries Commission. "It does nothing constructive. All it does is divide people even more."

Court has removed limits

Here's what has led to the conflict: In deciding a case that involved a Nooksack Indian hunter named Donald Buchanan, Washington courts recently reinterpreted treaty language in a way that removes almost all state limits on where and when tribes can hunt.

Because of the Buchanan decision, Indian hunters who previously were restricted to areas their tribes ceded in treaties now may hunt on all "open and unclaimed lands."

With rare exceptions, state hunting laws do not apply. Indian hunters are subject only to the regulations of their individual tribes.

The Buchanan decision is not final. The Washington State Supreme Court has agreed to review the case next month, and the U.S. Supreme Court likely will have the final word.

In the meantime, big-game hunting in Washington has been thrown into chaos.

So far, the confusion is most apparent with elk, which are in relatively short supply. Non-Indian hunters accuse tribes of pouring into areas previously open only to non-Indians and decimating elk herds. "The Indians are killing off all the elk," said Tom Etheridge, a hunter who lives near Morton. "This is one country. Everybody needs to obey the same laws. If they don't, the elk are going to be gone."

The tribes say this is nonsense.

Most tribes manage their hunters as well, and in some cases better, than the state, they say. Tribal hunters take relatively few elk, compared with the 59,000 non-Indian hunters who flood the

woods each fall. Indian concerns about the health of elk herds and the natural environment run far deeper than those of most non-natives, Indians say, and the tribes' own court systems are fully capable of dealing with Indian hunters who break tribal hunting laws.

The real threat to the elk herds is not hunters, they say, but the asphalt and suburbs that extend deeper into the woods each year, destroying elk habitat.

"The tribes are the scapegoats," said Todd Wilbur, a hunting authority for the Swinomish Tribe. "Indian hunters take only 5 percent of the elk killed by hunters each year. The poaching alone is almost three times as much as what all tribes harvest off-reservation."

The Department of Fish and Wildlife makes no official estimates of the number of elk killed by Indian hunters. Privately, however, many managers and enforcement officers say they believe that 5 percent figure is low.

State game managers worry they will not be able to manage wildlife species in concert with 26 tribes, all of which are sovereign nations and many of which refuse to share with the state even such basic information as how many animals their hunters kill each year.

Smith said she has received 98 complaints from her non-Indian constituents, some of whom claim to be afraid to go hiking or pick huckleberries, knowing that Indians may be in the woods hunting.

Tony Forsman, a Suquamish Indian and a veteran of both the salmon war and the shellfish war, sees racial overtones in the debate over hunting that are all too familiar.

The last two times he went to public meetings on tribal hunting rights, Forsman said, he nearly was pushed into fistfights.

"Ignorance is our biggest enemy," Forsman said. "A lot of people don't want to listen to the facts because they just don't like Indians.

"If we can't work this out among ourselves, then the courts will do it for us with some big Boldt thing."

The search for compromise

Forsman doesn't want that. So far, at least, he and other Indian leaders are convinced that negotiation and compromise with the state are the best ways to resolve hunting conflicts.

Under the leadership of Wilbur, who represents the Swinomish Tribe, hunting managers from 22 tribes have been putting new energy into an organization called the Salish Intertribal Hunting Group, which meets monthly at Muckleshoot tribal headquarters near Auburn.

The group's goal is to speed resolution with the state and keep the hunting issue out of the courts - and away from Congress.

They're trying to minimize enforcement differences among tribes, standardize hunting seasons and regulations and pool resources so they can co-manage elk herds alongside the state.

That is proving to be difficult, some say.

The new court ruling upset traditional territorial agreements among tribes and opened hunting to competition and intertribal rivalry.

"It's not nice and neat," said Meyers, who has been working with the intertribal hunting group. "There are 26 tribes and, on most issues, 26 different points of view."

One of the intertribal conflicts involves tribes such as the Yakama Nation, whose former ceded areas include healthy, huntable elk herds.

Those tribes fear the new interpretation of the treaties will mean their elk herds will be overhunted by urban tribes from the Puget Sound area whose own hunting lands have been paved over.

"Here we have a situation where some of the tribes are saying, 'Hey this is the greatest thing since sliced bread,' while others are saying, 'Wait a minute,'" said Rolf Johnson, elk specialist with the State Department of Fish and Wildlife.

Uneasiness over court intervention

Most tribes seem to want to work out a co-management relationship with the state, but others would just as soon take the matter to court and let a federal judge decide.

If history is an indication, the federal court probably would treat the tribes very well.

"Look at the history of fishing," said Margaret Ainscough, spokeswoman for the Fish and Wildlife Department. "Before Boldt, tribes took something like 16 percent of the fish. After Boldt, they took 50 percent."

The hunting guarantee in the treaties is even more generally worded than the one that describes fishing, Ainscough said. If a judge were to decide the issue, she said, the decision could turn out to be very painful for the state and for non-Indian hunters.

Even so, it is in the tribes' best interest to stay out of court, Forsman said, because of the high costs of a legal settlement - cost not only in terms of money but in terms of time and good will. And, because of many unresolved tribal issues, some tribes are nervous about where a court-ordered settlement would leave them.

The tribes have done much better in court than they have in the court of public opinion. As hunting negotiations proceed, the tribes are operating with a heavy public-relations deficit.

Earlier this year, just as the tribes were struggling to make the point that they tightly regulate their hunters, three Tulalip tribal members were arrested for a grisly hunt that game regulators say was more like slaughter.

Around midnight Feb. 18, state game officers say, the Tulalip hunters used a spotlight while shooting five elk from the Spirit Lake Memorial Highway. Cowlitz County prosecutors filed charges, and the three men were scheduled for initial court appearances last week. One showed up; two did not. Cowlitz County Prosecutor Jim Stonier said he will seek warrants for their arrests.

Meanwhile, Tulalip officials insist the men should be prosecuted in tribal court, not state court. That jurisdictional controversy goes to the heart of the hunting dispute.

Neither side trusts the other to deal fairly with violators.

The Tulalip elk kill was so outrageous, no tribe would condone it, said Pete Jerry, the Muckleshoot representative on the new intertribal hunting group.

"That was a no-brainer," he said.

But Jerry said there are cultural differences between how Indians hunt and how non-Indians hunt. The concept of sport hunting and trophy hunting is alien to most Indians, according to Jerry. "We hunt for food," he said.

That can mean hunting late in the season when elk come out of the mountains and are more vulnerable. It can mean using "designated hunters," who kill many animals and distribute the meat to needy tribal members. It can mean choosing young, fat animals instead of old bulls with big antlers.

Those cultural differences may be distasteful to some non-Indians, Wilbur said, "but that doesn't mean they're bad. It's an appearance thing."

Smith sees it differently. Culture must come second to safety and conservation, she said. "Culturally, we're not going to have any animals left to be cultural about," she said.

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Page: A6

COOPERATION IS KEY TO HUNTING DISPUTE

Since January, state game managers have been negotiating with more than 20 of Washington's Indian tribes in an attempt to reach cooperative hunting agreements. Although progress has been slow, the talks are well worthwhile and long overdue.

These discussions are not occurring in a vacuum. They were spurred by the Buchanan decision, a controversial ruling issued in Yakima County Superior Court last year that gave tribes hunting rights on "open and unclaimed lands" anywhere in the state, even if those areas are far from a tribal member's home. Buchanan's "open and unclaimed" language has raised a host of thorny and unresolved questions about the geographical extent of treaty rights and the capacity of tribal officials to regulate hunters from other tribes in addition to their own.

The Buchanan ruling, however, was upheld by the Washington State Court of Appeals. The case is now headed to the state Supreme Court, where it is scheduled to be heard in early June. The court may help by clarifying whether tribal hunters may roam far from their ancestral hunting grounds - an issue legitimately in dispute. The court would also do well to put state-operated elk feeding stations off-limits to tribal hunters. Tribes should recognize this is sensible policy.

But no matter what the court decides, it would be in everyone's best interest to work together to avoid court-ordered harvest allocations akin to the landmark Boldt decision. Issued in 1974, the Boldt ruling gave Washington tribes fishing rights to 50 percent of the state's harvestable salmon each year. Such heavy-handed intervention would be unfortunate.

Other suggestions floated recently - including ill-advised legislation recently proposed by U.S. Rep. Linda Smith (R-Hazel Dell) - would be equally unhelpful. Instead, state game officials and tribal governments should continue their efforts to reach voluntary, realistic and enforceable agreements that will result in effective management of the state's big-game herds.

Tribes also must understand they will be under enormous pressure to regulate themselves. Hunting abuses such as February's irresponsible elk kill on the Mount St. Helens preserve have been public relations nightmares for all tribes. This incident and others have made it all the more important that tribes demonstrate the ability to effectively police themselves and each other.

Much too often, though, tribes are unfairly accused of decimating the state's elk herds. These allegations have no basis in fact. The truth is Indians take somewhere between 5 and 16 percent of all elk harvested each year. The state estimates tribal hunters took fewer than 300 elk statewide during the 1995-96 season, while non-tribal hunters took more than 6,400.

The real problem for tribal and non-tribal hunters alike is the precipitous decline in elk populations, which are impacted by unrelenting habitat destruction and development. These are facts that blame-shifting and name-calling won't change.

In the end, the state, the tribes and non-tribal hunters must find ways to cooperatively manage the resource. Because if they do not, soon there may be nothing left to manage.

(2)

Supreme Court, U.S.
FILED
DEC 6 1999
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No. 99-783

IN THE

Supreme Court of the United States

DONALD R. BUCHANAN,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF WASHINGTON

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Washington's Supreme Court, following the Supreme Courts of Idaho and Montana, correctly interprets the right to hunt on open and unclaimed land as permitting hunting both on ceded land and on land traditionally hunted by the tribe?

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STATEMENT OF THE CASE

On January 6, 1995, Donald Buchanan was stopped by wildlife enforcement officers for hunting on land owned and managed by the State of Washington in the eastern part of the state. He possessed two dead five-point, branch-antlered bull elk while his state hunting license was revoked and elk season closed.

Buchanan lives in Kent, Washington, a Seattle suburb west of the Cascade Mountains. He is an enrolled member of the Nooksack Indian Tribe. The Nooksack reservation is in Whatcom County — west of the Cascade Mountains and Washington's tribe nearest the Canadian border. The lands ceded to the United States by the Nooksack Tribe under the Treaty of Point Elliott are bordered on the east by the summit of the Cascade range. Thus, Buchanan hunted on the other side of the Cascade Mountains from his tribe's ceded land and from his home. *See* App. A.

The State charged Buchanan with possessing big game during closed season and hunting while his license was revoked. He moved to dismiss claiming the State's regulations do not apply to him because he has the treaty right to hunt on open and unclaimed lands. He alleged the only regulations governing tribal hunting on open and unclaimed lands are Nooksack tribal regulations.

The trial court dismissed the charges and ruled the treaty gives tribal members a right to hunt anywhere in the "Territory of Washington." The Court of Appeals affirmed. The State appealed. Washington's highest court unanimously held these hunting rights are geographically available in the ceded territory and may include other areas if they are proven

to have been actually used for hunting and occupied by the Nooksacks over an extended period of time.

REASONS FOR DENYING THE WRIT

I. THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES

The Washington Supreme Court followed case precedent when it interpreted the Indian right to hunt on open and unclaimed land as the right to hunt on ceded land and on traditional tribal hunting grounds.

A. The geographic scope of the Nooksack right to hunt on open and unclaimed lands cannot be determined from the treaty language alone. The context in which the treaty arose must also be examined in order to determine the parties' intent.

Buchanan claims the treaty language granting Indians the right to hunt open and unclaimed land has no geographic limitation. Case precedent holds otherwise. "Open and unclaimed" is defined by case law as the right to hunt off-reservation on all state and federally-owned land except federal parks. *See State v. Miller*, 102 Wn. 2d 678, 680 at n.2, 689 P.2d 81 (1984) (citations omitted).

It is a well-accepted fact that Indian treaties are "not a grant of rights to the Indians, but a grant of rights from them, — a reservation of those not granted." Bradley I. Nye, *Where Do the Buffalo Roam? Determining the scope of American Indian Off-Reservation Hunting Rights in the Pacific Northwest*, 67 Wash. L. Rev. 175, 187 (1992), *citing United States v. Winans*, 198 U.S. 371, 381 (1905).

Even before *Winans*, however, this interpretation of the meaning of treaties was expressed in a Washington territorial case, *United States v. Taylor*, 3 Wash. Terr. 88, 13 P. 333 (1887) (App. B); Felix S. Cohen, *Handbook of Federal Indian Law*, at 444 n.20 (1982). The reservation of rights has been followed continually since in cases such as *Seufert Bros. Co. v. United States*, 249 U.S. 194, 199 (1919) (hereafter *Seufert Bros.*); *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 679-81 (1979) (hereafter *Fishing Vessel*); Cohen, *supra*, at n.21; and Charles F. Wilkinson, *Indian Tribal Rights and the National Forests: The Case of the Aboriginal Lands of the Nez Perce Tribe*, 34 Idaho L. Rev. 435, 447-48 (1998).

Consistent with prior case law, the Washington Supreme Court applied the doctrine of reserved Indian rights to determine the meaning of "open and unclaimed" in Buchanan's case. Justice Guy observed certain tribal rights, such as hunting and fishing rights, have belonged to the Indians from time immemorial. A treaty documents a grant of some rights from the tribe to the federal government; however, those rights not expressly ceded in the treaty, as well as those expressly reserved, remain with the tribe. *State v. Buchanan*, 138 Wn. 2d 186, 203, 978 P.2d 1070 (1999), *citing* Dana Johnson, *Native American Treaty Rights to Scarce Natural Resources*, 43 U.C.L.A. Law Rev. 547, 552 (1995).

The *Buchanan* court also recognized the reservation of rights doctrine has consistently been applied to the fishing and hunting provisions of the Stevens Treaties at issue here. *State v. Buchanan*, 138 Wn. 2d at 203, *citing as examples Fishing Vessel* and *Seufert Bros*. Thus, consistent with prior cases, *Buchanan* analyzed the geographic scope of the

Nooksack hunting right *first* in light of the long-standing reservation of rights doctrine. Again as in many prior cases, the court then applies the other rules of treaty interpretation.

The *Buchanan* court held the Nooksacks reserved the right to hunt on open and unclaimed ceded land, together with the right to hunt their traditional grounds. The court's analysis is consistent with over a hundred years of precedent. The *Buchanan* court asked the two basic questions of treaty interpretation: what rights did the tribe reserve and what did the parties intend by "open and unclaimed"? The court then applied the principles of treaty construction, such as construing ambiguous language in a manner non-prejudicial to the Indians, to decide the scope of off-reservation hunting rights. *Buchanan* decided the Nooksacks may hunt off-reservation on their ceded and traditionally hunted lands. This analysis is consistent with both precedent and the well-established rules of treaty construction.

Petitioner argues *Buchanan* erred because the plain language of the treaty controls. This ignores the "well-accepted fact" of the reservation of rights doctrine and erroneously views the treaty as simply a contract. *See* Nye, *supra*, at 187. Although the goal of treaty interpretation is the same as the goal of contract interpretation (determining the intent of the parties), the analysis of the parties' intentions begins with the language of the treaty and the *context* in which the written words are used. *Buchanan*, 138 Wn. 2d at 201-02, *citing Fishing Vessel* and *United States v. Washington*, 157 F.3d 630 (1998), *cert. denied*, 119 S. Ct. 1377 (1999) (emphasis added).

The *Buchanan* court then applied the established rules of treaty construction to interpret the parties' intent. Initially, and contrary to Petitioner's claim, the treaty must

"be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Buchanan, supra, citing Fishing Vessel* (internal citation omitted) and *State v. Miller*, 102 Wn. 2d 678, 683 (1984).

Next, the *Buchanan* court observed, where there is ambiguity in the language of the treaty, it must not be construed to the prejudice of the Indians. *Buchanan*, 138 Wn. 2d at 202, *citing Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (hereafter *Mille Lacs*) (additional citations omitted). However, courts may not ignore treaty language that, viewed in its historical context and given a fair appraisal, clearly runs counter to the tribe's claims. *Buchanan, supra, citing Oregon Department of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985); *Department of Ecology v. Yakima Reservation Irrigation District*, 121 Wn. 2d 257, 277, 850 P.2d 1306 (1993). Additionally, treaties must be construed liberally in favor of Indians. *Buchanan, supra* (citations omitted).

Petitioner claims because the plain language of the treaty does not geographically limit off-reservation hunting to ceded or aboriginal lands, no geographic limit except the "Washington Territory" exists. Again contrary to precedent, Petitioner disregards reserved rights. He errs because the "doctrine" has been a well-accepted fact in Northwest treaty construction since before Washington became a state.

Lastly, with respect to rules of construction, Petitioner claims the Washington Supreme Court failed to broadly interpret the Treaty of Point Elliott in favor of the Indians. Petitioner is correct that treaties must be broadly construed

in favor of Indians. *Buchanan* in fact construes the treaty provision broadly in the tribe's favor.

Buchanan interprets "open and unclaimed" as *adding* aboriginal lands to ceded lands as areas available for Nooksack off-reservation hunting. In doing so, the court favors the Indians by increasing the area they may hunt off-reservation. This expanded geographic scope benefits tribes and is consistent with principles of treaty construction and case precedent. Because the decision is consistent with precedent, certiorari is unnecessary. However, if review is granted, the better analysis is that tribes should not be allowed to hunt outside their reservations since there are no longer any "open and unclaimed" lands as that term was understood by the Indians. *Ward v. Race Horse*, 163 U.S. 504 (1896); *Crow Tribe of Indians and Thomas Ten Bear v. Repsis*, 73 F.3d 982 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 1851 (1996).

B. Washington's Supreme Court determined the scope of off-reservation hunting rights consistent with the Idaho and Montana Supreme Courts.

The Idaho Supreme Court previously analyzed the scope of off-reservation treaty hunting rights in the landmark case of *State v. Arthur*, 261 P.2d 135 (Idaho 1953), *cert. denied*, 347 U.S. 937 (1954). In *Arthur*, a tribal member hunted on a National Forest Reserve. The court analyzed the treaty language "open and unclaimed land" by asking what this phrase meant to the parties when they signed the treaty, and what rights was the phrase intended to reserve. Nye, 67 Wash. L. Rev. at 183, *citing Arthur*, 261 P.2d at 183. The court held the treaty right is a reserved right "to hunt upon open and unclaimed land . . . at any time of the year in any of the lands ceded to the federal government though such lands

are outside the boundary of their reservation." *Arthur*, 74 Idaho at 265; *Buchanan*, 138 Wn. 2d at 206.

More recently, in *State v. Coffee*, 556 P.2d 1185, 1189 (1976), the Idaho Supreme Court again analyzed off-reservation hunting rights by examining reserved rights. The court observed treaties are reservations of aboriginal rights, and both the signatory tribes and the federal treaty negotiators understood that rights of access would be limited to traditional hunting grounds which remained "open and unclaimed" or "unoccupied." Nye, *supra*, at 190, *citing Coffee*, 556 P.2d at 1188.

In addition to Idaho, the Montana Supreme Court analyzes treaty hunting rights with reference to the Indians' reserved rights. Montana's highest court explicitly follows Idaho and concludes hunting and fishing rights under similar treaty language are "part and parcel with aboriginal title" using the reservation of rights analysis. *State v. Stasso*, 172 Mont. 242, 563 P.2d 562, 563 (1977), *citing Coffee*, 556 P.2d 1185. *Stasso* concludes the Indians, at the time of the treaty, reserved the right to hunt on open and unclaimed lands outside their present day reservation, but within their aboriginal hunting territory. *Stasso*, 563 P.2d at 564.

Thus, *Buchanan* relies on the reservation of rights doctrine to determine the geographic scope of off-reservation hunting, consistent with the sister states of Idaho and Montana. The Washington Supreme Court concludes, consistent with precedent, that "open and unclaimed" means treaty tribes may hunt their ceded and traditional hunting areas. Because the decision is consistent with precedent, certiorari is unnecessary.

C. This case does not conflict with federal precedent.

Petitioner contends two federal decisions conflict with the Washington Supreme Court: *Mille Lacs* and *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) (hereafter *Boldt*). Neither conflicts with *Buchanan*.

Landowners and counties in *Mille Lacs* argued the Wisconsin Bands do not hold usufructuary rights in the Minnesota portion of the *ceded* territory because none of the Wisconsin Bands used and occupied the area at treaty times. *Mille Lacs* does not conflict with *Buchanan* because the right to hunt non-ceded land was at issue in *Buchanan*.

As noted, because Buchanan hunted on land hundreds of miles from his tribe's ceded lands, the court had to determine if he had any *other* right to hunt in the area. Aboriginal right, if proven by prior use, is distinct from the right to hunt on ceded lands since the two areas, as in this case, may differ geographically. *Mille Lacs* rejected attempts to limit tribal hunting on ceded land to land that was also traditional hunting ground. *Buchanan* did not decide this issue; thus, it is consistent with *Mille Lacs*.

Nor does *Buchanan* conflict with *Boldt* or the shellfish cases. Petitioner contends these cases hold the reservation of rights doctrine may not be used to limit off-reservation hunting rights for treating Indians. Petitioner fails to recognize these cases interpret the treaty right to fish rather than the right to hunt.

The rights differ in scope and intended duration. The treaty fishing right reserved in the Stevens Treaties has been

interpreted to provide a broad right to fish outside ceded lands in all usual and accustomed fishing areas, and, more importantly, the right to fish is interpreted as a permanent one, unless abrogated by Congress. *Buchanan*, 138 Wn. 2d at 104 *citing Boldt* and *Fishing Vessell.*

In contrast, the treaty hunting right, by its terms, is of a temporary and self-limiting nature. The right was intended to diminish as lands became settled, without the need of congressional action. *Buchanan*, 138 Wn. 2d at 105, *citing United States v. Hicks*, 587 F. Supp. 1162, 1164 (W.D. Wash. 1984) as an example.

Even if Petitioner accurately states the holdings of *Boldt* and the shellfish cases, they do not apply to *Buchanan*. *Boldt* and the shellfish cases address the permanent right to fish under the Stevens Treaties. *Buchanan*, on the other hand, addresses the temporary treaty right to hunt.

Petitioner's argument also fails because *Buchanan* used the reservation of rights doctrine to expand, not limit, off-reservation hunting. It has been clear in Washington for some time Indians may hunt on open ceded land. The question in *Buchanan* is whether a tribal hunter may also hunt on non-ceded land. The Washington Supreme Court decided the treaty Indians' reserved rights give Buchanan a different, additional basis for exercising his hunting rights on non-ceded land: aboriginal title, to be proven by the Nooksack's prior use of this land for hunting.

Because *Buchanan* uses reserved rights to expand, not limit, the geographic scope of tribal off-reservation hunting, its holding is consistent with *Boldt* and the subsequent shellfish litigation decisions of the federal courts.

II. CONFUSION WILL ONLY ARISE IF THE WASHINGTON SUPREME COURT'S DECISION IS DISTURBED

Finally Petitioner claims review should be granted because *Buchanan* has caused confusion. The argument is without merit.

The only demonstrated confusion over the scope of off-reservation hunting rights resulted from the superior and lower appellate court opinions in this case. Those courts erroneously held off-reservation hunting could occur anywhere within the "Washington Territory."

This holding created great confusion because it was contrary to precedent and to the understanding of many tribes. As stated in Petitioner's Appendix at 18:

> The new court ruling upset traditional territorial agreements among tribes and opened hunting to competition and intertribal rivalry . . .
>
> One of the intertribal conflicts involves tribes such as the Yakama Nation, whose former ceded area include healthy, huntable elk herds.
>
> Those tribes fear the new interpretation of the treaties will mean their elk herds will be overhunted by urban tribes from the Puget Sound area whose own hunting lands have been paved over.

The Tacoma News Tribune, May 27, 1998, Rob Carson; Petitioner's Appendix at I5-I10.

Petitioner argues the sole geographic boundary for off-reservation hunting rights is the "Washington Territory." The only confusion created in this case came when the lower courts adopted Petitioner's argument. The Washington Supreme Court has cleared the confusion and returned off-reservation hunting rights to the relative clarity created by earlier state and federal cases.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — MAP



Representation of Tribal Ceded Areas and
WDFW Game Management Unit (GMU) Boundaries

DRAFT

Tribal Area

- Non-treaty
- Nez Perce
- Yakama
- Point Elliott
- Point No Point
- Yakama/Nez Perce
- Medicine Creek
- Quinault
- Makah
- Umatilla Walla Walla
- Medicine Cr./Pt. No Point
- National Parks

Treaty Boundary Interpretations

- WDFW 1999 Interpretation
- DNR 1964 Version
- DOE 1998 Version

ABOUT THE MAP

[illegible]
[illegible]
MILES
Map Scale - 1:764392
MAP PROJECTION
State Plane South
NORTH AMERICAN DATUM - 1927
Produced : August 23, 1999

BEST AVAILABLE COPY

APPENDIX B — *UNITED STATES v. TAYLOR*, 3 Wash. Terr. 88, 13 P. 333 (1887)

[Decided January 25, 1887]

UNITED STATES AND OTHERS

v.

FRANK TAYLOR.

INDIANS — RIGHT TO FISHERIES — TREATY OF JUNE 9, 1855 — INJUNCTION. — Under the treaty of the United States with the Yakima tribe of Indians, entered into June 9, 1855, conferring on them the right of taking fish at all usual and accustomed places, in common with the citizens of Washington Territory, etc., the privilege is reserved to them to enjoy all the fisheries they had theretofore enjoyed; and when a person, under an act of Congress passed subsequently to the treaty, obtained a patent for homestead land abutting upon the Tum Water fishery, and erected and maintained a fence thereon, which obstructed the approaches to the fishery, and prevented the enjoyment by the Indians of the right which had been so reserved to them, equity will interfere by injunction and cause the removal of the obstruction.

APPEAL from the District Court holding terms at North Yakima. Fourth District.

The complaint sets forth that the Yakima tribe of Indians, with confederated tribes, formerly owned and occupied a large area of land, embracing within its scope what are now the several counties of eastern Washington Territory; that

the Columbia River flowed through their domain; that this river abounded in salmon, a fish upon which, from time immemorial, the tribe of Indians had largely subsisted; that while the fish were used by all, to many members of the tribe they constituted an indispensable article of food; that from traditional times, these fish had annually entered the Columbia River from the sea, and gathered in great numbers at a few certain places or fisheries, the principal and most important of which was the one mentioned; that this fishery was within the country of these confederated Indian tribes, and to it the members of the tribes had been accustomed to go during the fishing season, and upon the adjacent river banks found a temporary home for themselves and families, pasturage for their ponies, and places to land and cure the fish which was preserved for winter use. The complaint alleges the making and conclusion between the confederated tribes and the United States of the treaty of June 9, 1855, ratified by the Senate March 8, 1859; that in consideration of certain annuities and compensations, made by the government to the Indians, they had ceded to the United States most of their country, and made concessions relative to rights of way and public highways across that portion of land they retained as their permanent reservation; that certain other rights and privileges were by the Indians expressly reserved; among which were the following: "The right of way with free access from the same [their reservation] to the nearest public highway, ... and also the right, in common with the citizens of the United States, to travel upon all public highways; . . . . the exclusive right of taking fish in all streams where running through or bordering said reservation, ... as also the right of taking fish at all usual and accustomed places, in common with the citizens of the

territory, and of erecting temporary buildings for curing them."

The complaint also sets forth, that by reason of the nature of the banks of the river the approach to the fishery was limited to certain defiles, or passage-ways; that at the time of the conclusion and ratification of the treaty, said Indians were so using and enjoying said fishery, and continued such use and enjoyment long thereafter, and until prevented by Taylor; that Taylor had fenced in the land bordering the river in front of the fishery over which the Indians were accustomed to pass in going to and from the fishery, and upon which they landed fish, erected their curing-houses, made their temporary abodes during the fishing season, and upon which they pastured their animals. The fishery is perhaps fifty or seventy-five miles or more distant from the reservation. The complaint averred that the Indian plaintiffs were old men, and through life looked to this source of supply for necessary food, and if deprived of it would perish. The plaintiffs prayed for an injunction, etc., and other equitable relief.

By his answer the appellee admits the making and ratification of said treaty, and the inclosing of said land by a fence, upon a portion thereof, over which said Indians had been accustomed to travel in going to and from said fishery; that there was no fence built upon the side next to the river, the river itself being the only means of inclosure on that side; but avers that he had the right, as owner in fee of said land, to thus inclose the same to protect his crops growing thereon, notwithstanding said treaty. Appellants replied, and the cause was tried upon these pleadings, and upon the facts

as stipulated in a statement agreed to by all parties, which is fully set forth in the opinion of the court. Findings and judgment for defendant, and plaintiffs appealed.

Mr. W. H. White, United States Attorney, and *Mr. John B. Allen,* for the Appellant.

A treaty entered into by the United States constitutes a part of the supreme law of the land, and is as much a part of the local law of Washington Territory as a statute lawfully enacted by its legislature. (*Ware* v. *Hylton,* 3 Dall. 236; *Hauenstein* v. *Lynham,* 100 U. S. 483.) When a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred. (*Shanks* v. *Dupont,* 3 Pet. 242; *Hauenstein* v. *Lynham,* 100 U. S. 487.) That construction of a treaty should be taken as the true one which has been adopted and acted upon by the parties to it. (*United States* v. *Payne,* 8 Fed. Rep. 892.) While the rule obtains generally of giving to treaties the most liberal construction, with a view of effecting the objects of the parties to them, it has a peculiar and special application in case of such a treaty as the one brought to the court's attention. This is a treaty made by a powerful, enlightened, and Christian nation, with ignorant and barbarous tribes who occupy toward that nation the anomalous attitude of a high contracting party, and at the same time that of a ward. The treaty is framed in the tongue of the civilized nation. For the aptness and adequacy of its language to protect their reserved rights as well as to cede their country, the Indians were not only dependent upon the nation with whom they dealt, but even for the interpretation and construction of that language. The court should not

hesitate, therefore, to give the most extended meaning to the language employed, to prevent the treaty being construed to the prejudice of the Indians. (*Worcester* v. *Georgia,* 6 Pet. 582; *The Kansas Indians,* 5 Wall. 760.) It may be true that an act of Congress may repeal a treaty. In such case, however, there are peculiar reasons for applying the rule with great strictness. (*Taylor* v. *Morton,* 2 Curt. 454; *The Cherokee Tobacco,* 11 Wall. 621.) It is not within the power of the courts or an executive officer of the government to contravene the provisions of this treaty. To each it is the supreme law of the land. It would not be within the power of the government, in the issuance of a patent, to deprive these Indians of a treaty right secured them. If the right of fishery claimed in this case was reserved to the Indians by treaty stipulation, Taylor and his grantors are charged with knowledge of the same. In short, the reservations of this treaty are in effect imported into the patent. (*The Peggy,* 1 Cranch, 109, 110.)

Mr. William Lair Hill, and *Mr. F. P. Mays,* for the Appellee.

By the common law, in the absence of governmental restriction, citizens have the right to take fish in the navigable streams, not at some particular places, but generally. But this right is subject to regulation by the government within whose local jurisdiction the streams lie. (*Coolidge* v. *Williams,* 4 Mass. 140; *Commonwealth* v. *Chapin,* 16 Am. Dec. 386.) A treaty, however, is under our system of government the "supreme law," — supreme in so high and broad a sense that no state or territorial government, nor any power short of the treaty-making power of the Congress of

the United States, can abrogate it. By this treaty it was intended that neither the territory nor future state of Washington should have the power, in the exercise of the right to regulate fishing in its great streams, to deny to these Indians the same privileges enjoyed by citizens. It might, for protection against extermination of fish, restrict the fishing to certain times, places, and methods, or, but for the treaty, it might, as governments have often done, altogether exclude all persons not citizens from fishing in its waters; but under this treaty the power to exclude the Indians (who are not citizens), or to deny to them any substantial rights of fishing, which are not denied to the citizen, is taken away in advance; and the Indians are further secured in the right to erect temporary buildings for curing fish, — a right not enjoyed by citizens under the common law. (*Coolidge* v. *Williams, supra; Cortelyou* v. *Van Brundt,* 3 Am. Dec. 439.) This right to go on the shore, upon the land of the defendant, to *cure* fish, cannot be extended by construction to include any other right upon the land. It is a right in derogation of his right to the exclusive possession of his land, as the owner in fee, and must be strictly confined within the prescribed limits. (*Taylor* v. *Hampton,* 17 Am. Dec. 710.) The right, *in common with citizens,* to take fish, implies neither the right to occupy defendant's land for the purpose of *catching* fish, nor the right to go over and upon his *other* lands, in traveling to and from the river; for that is not specified in the treaty, nor is it included in the right of fishing held in common with citizens. Citizens have no rights on the lands of defendant. (*Coolidge* v. *Williams, supra; Cortelyou* v. *Van Brundt, supra.*) The Indians have the right to go to the places where they have a right to fish in the river, and to go upon the shore to cure their fish. But this is a right arising out of

necessity, not a right specified in the treaty; and the necessity of trespassing upon defendant's land, either for taking fish or for approaching the shore, does not exist. The river being navigable, and by that fact a public highway, the Indians must use that as a means of approach. (*Turnbull* v. *Rivers,* 15 Am. Dec. 622.) The right of the defendant to build and maintain the fence is unquestionable. The treaty expressly secures to the Indians the right to travel upon the public highways of the territory. So they have a perfect means of approach, by the common highways, to the navigable streams, and by the navigable streams to the places where they desire to take and cure fish. Defendant, in the stipulated statement of facts, has admitted that the fishery in question is one of the "ancient, usual, and accustomed fisheries" referred to in the treaty. This admission in the written stipulation is merely a mistaken admission as to the contents and meaning of a law, and does not conclude this, no matter when made, from insisting upon the application of the law as it is, and in its true meaning. (*Brewster* v. *Striker,* 2 N. Y. 19; *Chatauqua County Bank* v. *White,* 6 N. Y. 253.) The treaty is so modified by the homestead law, subsequently passed, under which defendant obtained title, that all rights of the Indians upon the lands along the navigable rivers cease as to any particular tract, whenever the land is granted, under the law, to an individual. The treaty is the supreme law in no higher sense than an act of Congress is the supreme law. It may be abrogated by an act of Congress. A subsequent act of Congress in conflict with its provisions repeals it *pro tanto* by implication, just as if it were a previous act of Congress instead of a treaty. (*Foster* v. *Elam,* 2 Pet. 314; *The Cherokee Tobacco,* 11 Wall. 621.)

Appendix B

Mr. Justice HOYT delivered the opinion of the court.

This suit was brought by the United States, R. H. Milroy, as Indian agent, and several Indian plaintiffs, for themselves and for the Yakima nation or tribe of Indians, of which they are alleged to be members, to restrain the appellee, Frank Taylor, from maintaining a fence around a large body of land abutting upon Tum Water fishery in the Columbia River, which fence the complaint alleges obstructs the land approaches to said fishery, and thus prevents the whole enjoyment thereof claimed by said Indians under their treaty with the United States, entered into June 9, 1855, and ratified by the Senate of the United States March 8, 1859. By his answer the appellee admits the making and ratification of said treaty, and the inclosing of said land by a fence upon a portion thereof over which said Indians had been accustomed to travel in going to and from said fishery; that there was no fence built upon the side next to the river, the river itself being the only means of inclosure on that side; but avers that he had the right, as owner in fee of said land, to thus inclose the same to protect his crops growing thereon, notwithstanding said treaty.

Appellants replied, and the cause was tried upon these pleadings. There are other issues raised by the pleadings, but they are immaterial on this appeal, under the stipulation upon which the decree was given, from which this appeal is prosecuted. The stipulation referred to is as follows: —

"1. That the treaty mentioned in the complaint in this action was made and concluded as therein alleged, and that the plaintiffs are members of the Yakima tribe or nation of

Indians, as alleged in the complaint. 2. That prior to and at the time of entering into said treaty, the Tum water fishery, mentioned and described in the pleadings was one of the ancient, usual, and accustomed fisheries of said Yakima tribe or nation of Indians, and referred to in said treaty; was used and enjoyed as such by the Indians of said tribe in the manner in the complaint alleged, and continued to be so used and enjoyed therefor, except as hereinafter stated, and that said Indian plaintiffs as members of said tribe or nation so used and enjoyed the same. 3. That subsequent to the conclusion and ratification of said treaty, and before the commencement of this action, the said defendant, Frank Taylor, and his several grantors, obtained patents from the United States to the lands in the complaint and answer described, under the homestead, pre-emption, and other land laws of the United States, and said Taylor is still the owner thereof. 4. That said lands extend to and border upon the Columbia River at the site of said fishery, and are the same lands over and upon which said Indians have heretofore been accustomed to go and return from said fishery, and upon which they had landed and cured the fish taken by them from said fishery, and where they have been accustomed, during the fishing season, to make their temporary abode and pasture their ponies. 5. That since his acquirement of said land, said Frank Taylor, as owner thereof, has caused the same to be inclosed by lawful fences for the purpose of utilizing the same for agricultural purposes, thereby preventing said Indians from entering upon the same, as before they had been accustomed to do, under the claim that the United States, by means of the said grants, invested him and his said grantors with absolute title to said lands, and the exclusive right to use the same. 6. That upon these facts we submit to the court whether the defendant is

entitled to a decree dismissing plaintiff's bill. If the decision of the court should give the defendant the right to exclude the Indians referred to in the complaint from his said lands, the cause is to be dismissed and judgment entered for defendant; but if the court decides that said Indians are entitled to access over the lands of defendant to said fishery, then the cause shall proceed upon testimony to be taken as to the conduct of defendant complained of, in order to determine what relief shall be granted therein."

From the above stipulation, it will at once be seen that the single question now to be determined is that of the rights of the appellants under said treaty as against the appellee, as owner of the land by title acquired from the United States subsequent to said treaty under the homestead laws and other acts of Congress.

The portion of said treaty under which appellants claim their right to relief herein is as follows: "The exclusive right of taking fish in all streams where running through or bordering said reservation is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the territory, and of erecting temporary buildings for curing them, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land."

Both parties invoke the aid of the rule laid down by the Supreme Court of the United States, that a treaty of this kind is to be liberally construed in favor of the Indians, and that in so far as the language used will allow, that construction

will be adopted which will best subserve the object which the Indians at the time the treaty was made would have been most likely to have desired and understood. We must then investigate the treaty in question in the light of this rule. The appellants contend that this clause was a reservation from the force and effect of other portions of the treaty of certain rights therein specified, while the appellee insists that it should be construed as a specific grant of rights by the United States. We think the contention of the appellants must prevail, as it seems to us that the Indians in making the treaty would have been more likely to have intended to grant only such rights as they were to part with, rather than to have conveyed all, with the understanding that certain were to be at once reconveyed to them. What did the Indians intend to reserve to themselves by the words, "as also the right of taking fish at all usual and accustomed places, in common with citizens of the territory"?

It will be seen by the statement of facts above set out that at the time this treaty was made there existed within the territory which was the subject-matter of the treaty certain ancient fisheries which had for generations been used as such by said Indians, who had certain well-defined habits and methods connected with such use. And it is contended on the part of appellant that the effect of the words above quoted was to reserve to the Indians the right to enjoy all of these fisheries as they had heretofore.

While on the other side it is claimed that the liberal interpretation of the words in the interest of the Indians would make them apply, not to any particular places of fishing then in use, but to all places which in the future might become

usual and accustomed places of fishing, and that as to such places they had the same rights as other citizens, and in addition thereto, the right to use the shore for the purpose of curing their fish.

Many arguments can be and have been made in favor of each of these positions. But when we take into consideration the facts disclosed by this record, and the further fact, which the court knows as a matter of common knowledge, that these Indians were always tenacious in adhering to past customs and traditions, we think the contention of appellant must prevail, as we think it much more natural that these Indians should have desired to preserve as fully as possible a right then and for a long time before enjoyed by them, rather than to have provided for a right to be enjoyed in unknown ways and under new conditions, even although such new rights might possibly be of more avail than the old; besides, the construction contended for by appellee would make the right to use the shore for the purpose of erecting houses and drying fish a servitude imposed upon all the shore line of the territory, so that every person occupying the same would be liable to have his occupancy disturbed by such floating servitude, though at the time he purchased, the water in front of the land had never been a place used for taking fish. And it seems to us that this servitude would, when viewed from the standpoint of the United States as a contracting party, have been much more objectionable than the other one, though in the minds of the Indians, as the other contracting party therein, old places and methods would doubtless seem, and would probably be, to them of much greater value. The appellee further claims that even if the above position is correct, and the Indians were entitled by said treaty to the

rights claimed, still that such rights do not now exist as against the defendant, as by the act of Congress subsequently passed, under which he has taken this land, such treaty has, as to him, been repealed; but with this position we cannot agree, as these laws simply authorize the appropriation by the settler of unappropriated lands, and only authorize the extinguishment of the title which the government holds at the time of the appropriation. And if the land selected by the settler has at such time any servitude or easement impressed upon it, he takes subject thereto.

It follows from what has been said, and from the agreement of the parties, that the judgment of the District Court must be reversed, and the cause remanded for further proceedings in accordance with such stipulation and this opinion.

GREENE, C. J., and LANGFORD, J., concurred.

(3)

No. 99-783

Supreme Court, U.S.
FILED
DEC 20 1999
CLERK

IN THE
Supreme Court of the United States

DONALD RAY BUCHANAN,
Petitioner,

v.

THE STATE OF WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari to the Washington Supreme Court

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PETITIONER'S REPLY BRIEF

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A. The Washington Supreme Court Uniquely Applied The "Reserved Rights" Doctrine to Limit Treaty Hunting Allowed in "Open and Unclaimed" Lands.

The "reserved rights" doctrine of *Winans* and *Winters*, an accepted rule of Indian treaty construction, was misused below. Although the Idaho and Montana cases cited by Respondent and the Washington Supreme Court permit hunting under the Stevens Treaties in ceded lands and traditional hunting grounds, none of these cases uses the "reserved rights" doctrine to limit "open and unclaimed" lands to these areas.

In *State v. Arthur*, 261 P.2d 135 (Idaho 1953), *cert. denied*, 347 U.S. 937 (1954), the court states:

> The only question presented on this appeal is whether the defendant, as a member of the Nez Perce tribe, was entitled to hunt wild game on lands ceded by the Nez Perce tribe to the United States by the Treaty of 1855 . . .

261 P.2d at 136. The Idaho Court affirmed dismissal, rejecting the State's "equal footing" argument, but was not called on to decide whether the Nez Perce could hunt in "open and unclaimed" lands outside their ceded territory.[1]

---

[1] *Arthur* is significant for its reliance on treaty minutes to determine the "context" of the treaty and the intent of the parties:

> Governor Stevens, speaking before the Council, said:
>
> "You will be allowed to pasture your animals on land not claimed or occupied by settlers, white men. . . . You will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites; all this outside the Reservation."
>
> Governor Steven also stated, when addressing himself to Looking Glass, one of the spokesmen of the Indians, as follows:
>
> "I will ask of Looking Glass whether he has been told of our council. Looking Glass knows that in this reservation settlers cannot go, that he can graze his cattle outside of the reservation on lands not claimed by settlers, that he can catch fish at

In *State v. Coffee*, 556 P.2d 1185 (Idaho 1976), the court ruled that the non-treaty Kootenai Indian Tribe's aboriginal right to hunt was limited by the Hellgate Treaty of 1855 to "open and unclaimed" lands, even though the tribe was not a signatory. The case does not hold that the treaty tribes' right to hunt in "open and unclaimed" lands is confined to their ceded territory or to traditional hunting grounds.

In *State v. Stasso*, 563 P.2d 562 (Mont. 1977), the court affirmed the lower court's dismissal of charges, holding that National Forest lands where the defendant was hunting were "open and unclaimed." The *Stasso* court did not have to decide whether "open and unclaimed" lands were confined to the ceded territory or to traditional hunting grounds.

Finally, the case of *United States v. Taylor*, 3 Wash. Terr. 88, 13 P.333 (1887), which interprets "the right of taking fish at all usual and accustomed places," does not support Respondent's position. In fact, it helps illustrate one of the reasons the fishing right was confined to traditional areas, while the hunting right was not. The fishing right, which can impose a servitude of access on settled lands, had to be confined to usual and accustomed places, or it would hopelessly encumber "all the shore line of the territory." *Taylor*, Respondent's App. B at 13a. On the other hand, because the hunting right was confined

---

any of the fishing stations, that he can kill game and go to buffalo when he pleases, that he can get roots and berries on any of the lands not occupied by settlers."

Arthur, supra, 261 P.2d at 140-141. The Washington Court, on the other hand, rejected the plain language of the Stevens Treaties without any reference to the treaty minutes or to historical findings, relying on a law review article by student author Bradley I. Nye, *Where Do The Buffalo Roam? Determining the Scope of American Indian Off-Reservation Hunting Rights in the Pacific Northwest*, 67 Wash. L. Rev. 175 (1992).

to "open and unclaimed" lands, it could not create a servitude on settled lands, and did not have to be limited to traditional areas.

B. The Washington Supreme Court's Position Was Rejected By The Eighth Circuit.

Although a number of previous treaties had confined tribal off-reservation hunting to ceded lands,[2] including the 1837 Chippewa Treaty analyzed in *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999), the Stevens Treaties have no language limiting or reserving tribal hunting within ceded lands.

As with the Wisconsin Chippewa Bands in *Mille Lacs*, there is no evidence that the Nooksack Tribe had "exercised" its right to hunt throughout the ceded lands of the Point Elliot Treaty. Nevertheless, as Respondent concedes at page 9 of its Brief in Opposition, "[I]t has been clear in Washington for some time Indians may hunt [off-reservation] on ceded land." This is irreconcilable with the Washington Supreme Court's unique interpretation of the reserved rights doctrine.

The Washington Court's position—that treaties only reserve the right to hunt in locations that had been traditionally hunted at the time the treaties were signed—was rejected by the Eighth Circuit when it determined that the plain language of the Chippewa Treaty reserved the Wisconsin Chippewa's right to hunt throughout the ceded lands in Minnesota, where they had not historically hunted. *Mille Lacs, supra*, 124 F.3d at 933.

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[2] These treaties, e.g., the Potowatomi Treaty 1826, Miami Treaty 1826, Chippewa Treaty 1829, Pawnee Treaty 1833, and the Ottawa Treaty 1836, were made with Eastern tribes lacking the bargaining power of the Washington tribes, who had never been at war with the settlers.

C. The Ninth Circuit Has Rejected Washington's "Reservation of Rights" Argument Several Times.

In *United States v. Washington,* 506 F. Supp. 187 (W.D. Wash. 1980), *aff'd in relevant part,* 759 F.2d 1353, 1358-59 (9th Cir.) (*en banc*), *cert. denied,* 474 U.S. 994 (1985), Washington State argued that "because hatcheries were neither in existence nor in the parties' contemplation when the [Steven Treaties] were signed, the Indians could not have reserved the right to take hatchery fish." 506 F. Supp. at 200. Finding no language or intent in the Stevens Treaties to limit the fishing right to treaty-time practices the district court rejected Washington's argument.

> This claim contravenes considerable case law and is directly refuted by *Winans,* the leading case on which the state relies regarding the nature of reserved rights. . . .
>
> "New conditions came into existence, to which those (fishing) rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away."

506 F. Supp. at 200.

The Ninth Circuit has also rejected several other attempts by Washington to limit the fishing right of the Stevens Treaties to treaty-time practices under the "reserved rights" doctrine. *See* Cert. Petition at 20-22. These cases cannot be distinguished by labeling the right to hunt a "temporary" right without any support from the treaty language, treaty minutes or caselaw.

Although it was clearly contemplated by the parties to the Stevens Treaties that the extent of "open and unclaimed" lands would diminish as lands were claimed and occupied, there is no indication in the treaty minutes that

the parties intended the hunting right to disappear someday. Based on earlier settlement practices, the United States had no reason to assume that all the lands in the Washington Territory would someday be claimed and occupied. Otherwise, Governor Stevens' assurances to tribal leaders, *see, e.g.*, note 1, *supra*, would have been very misleading.

As with the Indians' right to fish, the right to hunt had to accommodate new conditions as they came into existence. Limiting that right to "open and unclaimed" lands was a commonsense solution to protect competing rights. The Indians would maintain their right to wander and hunt, while the white settlers were afforded security and privacy in the use of lands they had acquired and staked out. *See State v. Chambers*, 81 Wn.2d 929, 935, 506 P.2d 311 (1973). This accommodation affected neither the permanency nor the importance of the right to hunt.

CONCLUSION

For the reasons set forth above and in the Petition for a Writ of Certiorari, the writ should be granted.

Respectfully submitted,

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